

(25,285)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 477.

THE ARIZONA COPPER COMPANY, LIMITED, PLAINTIFF  
IN ERROR,

vs.

JOSEPH B. HAMMER.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR  
THE DISTRICT OF ARIZONA.

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1 *Names and Addresses of Attorneys of Record.*

L. Kearney, Clifton, Arizona; F. E. Curley, Tucson, Arizona, Attorneys for plaintiff.

W. C. McFarland, H. A. Elliott, Clifton, Arizona, Attorneys for Defendant.

2 In the District Court of the United States for the District of Arizona.

JOSEPH B. HAMMER, Plaintiff,

vs.

THE ARIZONA COPPER COMPANY, LIMITED, a Corporation,  
Defendant.

*Amended Complaint.*

Plaintiff above-named in this, his amended complaint, complains of defendants and alleges:

1.

That plaintiff is a resident of the County of Greenlee, in the State of Arizona, and at times hereinafter mentioned was, and now is a citizen of the said State of Arizona.

2.

That defendant, The Arizona Copper Company, Limited, at all times hereinafter mentioned, was and now is a corporation, duly incorporated under the Acts of Parliament of the United Kingdom of Great Britain and Ireland known as the Company's Acts, 1862 to 1883, having its registered office at Edinburg, Scotland, and at all such times was and now is a corporation and subject of Great Britain, and that it has filed its appointment of its statutory agent in the office of the Arizona Corporation Commission, at Phoenix, Arizona, and also filed its appointment of its statutory agent in the office of the county recorder of the County of Greenlee, State of Arizona, and that it has published its articles of incorporation and filed the same in the office of said Arizona Corporation Commission, and that it has fully complied with all the requirements of law pertaining to foreign corporations doing business in said State of Arizona, and that during the times and places herein mentioned it was, has been, and yet is, such foreign corporation, lawfully doing business at said Greenlee county, and engaged in carrying on the business of mining, smelting, conducting machine shops, concentrator works, electric plants, railroading, treating and reducing ores, conducting stores, and engaged in divers other business pursuits at Greenlee County, State of Arizona, in its corporate name of "The Arizona Copper Company, Limited."

## 3.

That during the times herein mentioned, at a point of about two miles from the town of Clifton, Greenlee County, State of Arizona, the defendant has owned, maintained, conducted, and yet owns, maintains and conducts, extensive smelting and reduction works, where it manufactures from 70 to 90 tons of copper each day, and that in said smelter it grinds up and heats a large amount of flux and ore into calcine; that said ores are ground and heated at its roasters at said smelter from where it is taken to the feed floor of said smelter, and emptied into hoppers which carry it into the furnaces.

That said feed floor is elevated about eighteen feet above the ground, and is about four hundred feet long and about twenty-four feet wide, and lengthwise of this feed floor two standard gage railroad tracks traverse the same to roasters, a distance of about 1,000 feet, where calcine is loaded into large iron cars, propelled by electricity from said roasters to said feed floor, on said standard gage tracks.

That said cars weigh about 23,000 pounds, and hold about 30,000 pounds of hot calcine; that when said cars containing calcine are brought to said feed floor, the calcine is emptied from said cars into hoppers, which traverse said feed floor at right angles, and from said hoppers said calcine is emptied into furnaces.

4 That said cars have brakes and are arranged with slide gates, valves, or openings at the bottom thereof, which said openings are closed and opened with a lever, by the motorman in charge of said car, and when the lever is pulled which opens the said valves, the calcine runs out of said cars into said hoppers, which said hoppers are situated just underneath said feed floor, and connect with the furnaces of said smelter.

\*(That if said levers are not kept in proper place, said valves will open, and calcine will be emptied from said cars wherever the same may be situated, and defective brakes permitted said car to wander where plaintiff was working, as herein alleged.)

That on said feed floors there are about six cross tracks, of about sixteen inches wide, which cross said standard gage tracks at right angles.

That at the time of the injury herein complained of, some five or six hoppers, at right angles, crossed said feed floor just underneath thereof; said hoppers being about twenty-eight inches wide and thirty inches deep, and the same opening at the surface on said feed floor to receive said calcine.

That at the time of the injury herein complained of, the plaintiff was a boiler maker and skilled workman, and as such was an employee of defendant for hire, and within the scope of his employment, as servant of defendant, was making alterations about said feed floor by putting in angle irons around a hopper to make it dust proof, and performing work on what is called the fettling system.

That prior to and on December 28th, 1914, and at the time plaintiff received the injuries herein complained of, he was employed by

and in the employment of defendant, and that on said day while engaged in his work for defendant repairing and making improvements on said hoppers, and while acting within the scope of his duties as boiler maker and skilled iron worker, and while  
 5 acting under the said contract of employment as such employee of defendant, he received injuries in defendant's said smelter, and which said smelter then and there being operated and its machinery and equipment at all times herein mentioned are and were propelled by steam and electric power;

That said injuries were occasioned by the condition and conditions of plaintiff's said employment while working in hazardous employment in defendant's said smelter; that the circumstances and conditions of said injuries are as follows:

That on December 28th, 1914, while plaintiff was at work in one of said hoppers, as said skilled workman and employee of defendant, engaged in putting in an angle iron to make said hopper dust proof, and holding said iron below while plaintiff's helper was marking off holes from above for the purpose of securing said angle iron in place, and was performing said work just under one of said standard gage railroad tracks on said feed floor in said smelter, when large quantities of said hot calcine then being carried in one of defendant's cars, as aforesaid, escaped therefrom and fell into said hopper then occupied by plaintiff and over and upon plaintiff, and that said hot calcine greatly burned the plaintiff on his head and about his neck, and left arm from shoulder down was greatly burned, and the right arm from shoulder down was burned, and right hip and left leg all the way from groin to top of the foot were burned, and a burn on right hip, and that said sulphur fumes sickened and stifled plaintiff; that as a direct result of said burns the left hand and arm of plaintiff is  
 is weakened and crippled, and left hand rendered useless, which has, and will continue to disable the plaintiff from following his  
 6 vocation as boiler maker, steel foundry business, and skilled workman, and that his fingers and thumb on his left hand are drawn out of shape and are useless in the performance of manual labor requiring the use of the same, and that his stomach, \*(bowels, intestines, shoulder and general physical condition were thereby greatly and permanently injured and affected and he was otherwise greatly burned and injured) and that his right hip is greatly injured, and his left leg is injured, and that on account of said injuries, the plaintiff has been and is greatly disfigured, scarred, crippled and permanently injured, \*(and plaintiff's ability to earn a living has been greatly and permanently reduced).

That on account of said injuries the plaintiff has been compelled to undergo a hospital treatment where he was confined to his bed for nine weeks, and during which time he suffered great mental and physical pain, and had opiates injected into him to relieve his suffering, and yet suffers pain, and will continue to suffer pain.

### 5.

That at the time of said injuries the plaintiff was engaged in manual and mechanical labor in the employment of the defendant; that

said injuries were the result of an accident due to a condition of such occupation and of a place where the plaintiff was at work; that said injuries were not caused by the negligence of the plaintiff; that said injuries were the natural and proximate result of said condition or conditions of the employment of the plaintiff in said smelter and of the place of the performance of said work.

## 6.

That the plaintiff at the time of his injuries was fifty years of age; that his usual wages were from \$150.00 to \$200.00 per month, and that he was capable of earning such wages and for work  
7 within the line of his said employment, as such skilled worker, he received such wages; that he was strong, healthy, able-bodied and never had any sickness, and was intelligent and industrious; that his expectancy of life at the time of his said injuries was 20.91 years; that since said injury plaintiff has been unable to perform any kind of labor and has lost in wages \$450.00, and will be unable to perform any labor.

That in view of said premises the plaintiff has been and is damaged in the sum of fifty thousand (\$50,000) dollars, and for which the defendant is liable.

Wherefore, plaintiff demands judgment against defendant for the sum of fifty thousand (\$50,000) dollars; together with costs of this action.

L. KEARNEY,  
*Attorney for Plaintiff.*

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\*(NOTE.—Denotes amendments made to original Amended Complaint.)

Endorsements: No. 39 Tucson. In the District Court of the United States for the District of Arizona. Joseph B. Hammer, vs. The Arizona Copper Company, Limited, a corporation. Amended Complaint. Filed Nov. 3rd, A. D., 1915, at 9 A. M. George W. Lewis, Clerk. By Effie D. Botts, Deputy Clerk.

8 UNITED STATES OF AMERICA:

District Court of the United States, District of Arizona.

No. 137 (Phoenix).

JOSEPH B. HAMMER, Plaintiff,

vs.

THE ARIZONA COPPER COMPANY, LIMITED, a Corporation,  
Defendant.

Action Brought in said District Court and the Complaint Filed in the Office of the Clerk of said District Court in the City of Phoenix and County of Maricopa.

The President of the United States of America to the Arizona Copper Company, Limited, a corporation; James G. Cooper, Statutory Agent, Clifton, Arizona, Defendant, Greeting:

You are hereby directed to appear, and answer the complaint in an action entitled as above, brought against you in the District Court of the United States, in and for the District of Arizona, within 20 days after the service on you of this summons—if served within this County; or within thirty days if served elsewhere.

And you are hereby notified that unless you appear and answer as above required, the said plaintiff will take judgment for any money or damages demanded in the Complaint, as arising upon contract, or will apply to the Court for any other relief demanded in the complaint.

Witness: the Honorable William H. Sawtelle, Judge of said District Court, this 30th day of March in the year of our Lord one thousand nine hundred and fifteen and of our Independence the one hundred and thirty-ninth.

[SEAL OF COURT.]

GEORGE W. LEWIS, *Clerk*,

By R. E. L. WEBB,

*Deputy Clerk.*

9 UNITED STATES MARSHAL'S OFFICE,  
*District of Arizona:*

I hereby certify that I received the within writ on the 31 day of March, 1915, and personally served the same on the first day of April, 1915, upon Jas. G. Cooper, personally, by delivering to, and leaving with him a true copy hereof to which was attached a copy of the Bill of Complaint, filed herein. The said Jas. G. Cooper at the time of service being the Statutory Agent of Defendant Corporation, the Arizona Copper Company, Limited. Service was made at Clifton, Greenlee Co., Arizona.

J. P. DILLON,

*U. S. Marshal,*

By I. N. DILLINER, *Deputy.*

April 2, 1915.



Marshal's Docket No. 472. No. 137 Phoenix. No. District Court, District of Arizona. Joseph B. vs. The Arizona Copper Company, Limited, a Plaintiff. Summons. L. Kearney, Clifton, Arizona, Phoenix, Arizona, Plaintiff's Attorneys. Filed George W. Lewis, Clerk. By R. E. L. Webb,

District Court of the United States for the District of Arizona.

JOSEPH B. HAMMER, Plaintiff,  
vs.  
ARIZONA COPPER COMPANY, LIMITED, a Corporation,  
Defendant.

*First Amended Answer.*

Arizona Copper Company, Limited, a corporation, named by its attorneys with this its answer to it on file herein and demurs thereto and for it alleges and shows the court as follows:

#### I.

appear in and by the allegations of plaintiff's at the time and place of his alleged injury or in a labor, service, employment or occupation never mentioned and provided for in Chapter 6 of Revised Statutes of the State of Arizona, 1913.

#### II.

appear in and by the allegations of said complaint injury or injuries were caused by or resulted or accidents to this plaintiff in the course of work or occupation, as in said complaint alleged and of and in the course of plaintiff's labor, service and due to a condition or conditions or plaintiff's employment.

#### III.

appears in and by the allegations of said complaint plaintiff has any cause of action against this defendant on the negligence of this defendant, its servants, agents, and not by reason of an accident or injury in the course of work in his employment or in said complaint alleged, arising out of and in the service and employment and due to a condition or condition of said occupation or employment.

#### IV.

That if it be held by this court that plaintiff's complaint contains allegations sufficient to constitute a cause of action under the provisions or any thereof of said Chapter 6 of Title 14 of the Revised Statutes of the State of Arizona, 1913, this plaintiff has nevertheless attempted to set forth in his said complaint a cause of action, the sufficiency of which is not admitted but expressly denied, under the common law or the law otherwise than as provided by said Chapter 6 of said Title 14 in this particular, namely: Alleged injury or injuries to this plaintiff by reason of the negligence of this defendant, its servants, employees or other agents, by reason of which several causes of action are improperly united in plaintiff's complaint.

#### V.

That it does not appear in said complaint that plaintiff's alleged injury or injuries was not caused by his own negligence.

#### VI.

That it appears in said complaint that the alleged injury or injuries of this plaintiff, if any there were, were occasioned, wholly by, and resulted from the usual and ordinary risks of the employment in which the plaintiff was engaged at the time and place of the 12 said alleged injury or injuries as in said complaint described, and were wholly assumed by this plaintiff in entering upon and continuing in said employment, and that said risks were wholly known to and appreciated by said plaintiff in entering on and continuing in said employment, or by the exercise of reasonable diligence on the part of this plaintiff, could have been fully known to and appreciated by him, in that it is not alleged in said complaint that the dangers of said employment at the time and place and in the manner mentioned and described in said complaint, were latent or hidden from or undiscovered to this plaintiff, and that by the exercise of due or any diligence or care for his personal safety, that he could not have discovered said conditions and have thereby avoided his said injury or injuries.

#### VII.

That it is not alleged in said complaint that the acts and things done or said by the officers, servants, employees or other agents of this defendant, at the time and place of plaintiff's alleged injury or injuries by this plaintiff in his complaint alleged to have caused the said injury or injuries, were done and said by such officers, servants, employees or other agents of this defendant, while acting within the course of the employment and within the scope thereof of said officers, servants, employees or other agents, while then and there in the employ of this defendant.

#### VIII.

That said complaint does not state facts sufficient to constitute a cause of action against this defendant.

Wherefore defendant prays judgment as to the sufficiency of said complaint in the particulars hereinabove specified and that plaintiff take nothing thereby and that defendant go hence with its costs.

13

## IX.

It appears upon the face of the said complaint that plaintiff seeks to recover judgment against the defendant under and by virtue of Chapter 6, Title 14, Revised Statutes of Arizona, 1913, known as the Employers' Liability Law, enacted pursuant to the provisions of Section 7 of Article 18 of the Constitution of the State of Arizona, without any charge or showing of negligence, wrong or default on the part of this defendant causing or contributing to plaintiff's alleged injury, and that said Employers' Liability Law, and said Section 7 of Article 18 of the Constitution of Arizona are in contravention and violation of the Constitution of the United States, particularly the 14th Amendment thereto, in that they seek to deprive this defendant of its property without due process of law, and deny it the equal protection of the laws of the State of Arizona by subjecting it to the unlimited liability for damages for personal injuries suffered by its employee without any fault, wrong or negligence on the part of this defendant, causing such injuries or contributing thereto, and for the reasons in this paragraph above set forth said complaint does not state facts sufficient to constitute a cause of action against this defendant.

## X.

It appears on the face of said complaint, and the records so show in this cause, that plaintiff seeks to recover judgment against defendant under and by virtue of the provisions of Chapter 6 of Title 14 of the Civil Code, the Revised Statutes of Arizona, 1913, known as the Employers' Liability Law, and that said Employers' Liability Law is in violation and contravention of the Constitution of the State of Arizona, and particularly of Sections 5 and 7 of Article 18 thereof, in that said Employers' Liability Law attempts to give the plaintiff the right to recover damages from defendant in this action, notwithstanding the injuries for which said damages were claimed were contributed to or in part caused by plaintiff's own negligence, and attempts to deprive defendant of the right to wholly defeat this action by showing said injuries were contributed to and in part  
 14 caused by plaintiff's own negligence, and that for the reasons in this demurrer set forth, said complaint does not state facts sufficient to constitute a cause of action against this defendant.

Wherefore, defendant prays judgment as to the sufficiency of said complaint, and for its costs.

W. C. McFARLAND,  
 H. A. ELLIOTT,  
*Attorneys for Defendant.*

Without waiving any of the foregoing demurrers, but if the same shall be overruled or denied, this defendant further answering said complaint admits, denies and alleges as follows:

1.

Admits the allegations of Paragraph 1 of plaintiff's complaint.

2.

Admits the allegations of Paragraph 2 of plaintiff's complaint.

3.

Admits the allegations of Paragraph 3 of plaintiff's complaint, save and except that this defendant denies that this plaintiff at the time of his said injury or injuries as claimed and alleged in said complaint, was acting within the scope of his employment as servant of this defendant, while making alterations above the feed-floor by putting in angle-irons around a hopper to make it dust proof on what is called the fettling system, as mentioned and described in said complaint.

4.

Admits that prior to and on December 28, 1914, and at the time this plaintiff received the injury or injuries mentioned and complained of in said complaint, plaintiff was employed by and in the employment of this defendant. Denies that this plaintiff received injury or injuries in defendant's smelter as mentioned and

15 described in said complaint on last said date while this plaintiff was engaged in his work for this defendant and while acting within the scope of his duties as boiler maker and skilled iron workman, as in said complaint described, and in this connection this defendant alleges that this plaintiff did on the said date of his said claimed injury or injuries, carelessly, negligently, wantonly and wrongfully depart from, refuse to obey, comply with or in any way or manner to follow the express orders, directions, requests and instructions of this defendant, its authorized officers, servants, employees and other agents, by reason whereof the injury or injuries of plaintiff, if any he have received, were directly, approximately and wholly caused.

Admits that prior to and on December 28, 1914, defendant's smelter had been and was operated, and its machinery and equipment at all times had been and were propelled by steam and electrical power as mentioned and described in said complaint.

Denies that plaintiff's injury or injuries as set forth and claimed in said complaint or otherwise, were occasioned by the condition and conditions or conditions of plaintiff's employment, while working in a hazardous employment in defendant's smelter, as described in said complaint or otherwise.

Admits that on December 28, 1914, this plaintiff was at work in a hopper, as described in said complaint, and as a skilled workman and employee of defendant engaged in putting in an angle-iron to make said hopper dust proof, and was holding said iron from below while plaintiff's helper was marking holes from above for the purpose of securing said angle iron in place, and was performing said work just under one of said standard gauge railroad tracks on the feed-floor,

as in said complaint described, \*(but denies that this defendant, its officers, agents, servants or other employees did at such time and place carelessly and negligently cause one of its cars propelled by electricity and loaded with hot calcine, without notice or warning to this plaintiff and at such time and place carelessly and negligently brought said car to, over and above where plaintiff was performing said work in said hopper. Denies that this defendant at said time and place carelessly and negligently caused the valves of said car at the bottom thereof to become open, so that large quantities of hot calcine and sulphur fumes were negligently and carelessly poured upon the plaintiff while he was in said hopper and unable to escape therefrom as in said complaint alleged, or at all.) Admits that plaintiff received certain burns from said hot calcine, mentioned and described in said complaint, \*(but denies that said burns, injury or injuries and the effects and results thereof, as described in said complaint or otherwise, were occasioned directly, indirectly, approximately or at all by the negligence of this defendant, its officers, servants, employees or other agents,) but denies that the injury or injuries of this plaintiff, if any he have received, as described in said complaint or at all, were occasioned by the condition or conditions of plaintiff's employment or occupation and arose out of and in the course of plaintiff's labor, service and employment with this defendant, and in this connection this defendant alleges and asserts.

That defendant furnished and provided this plaintiff with a helper, able-bodied and fit to perform his work as such helper; that it was one of the duties of said helper to watch for and observe the approach of the cars propelled by electricity and loaded with hot calcine as mentioned and described in plaintiff's complaint and to warn this plaintiff of the approach of such cars and to signal and stop the person or persons in charge of and operating said cars to give this plaintiff an opportunity to take and assume a place of safety for the purpose of allowing said cars to approach and pass on without injury or harm to this plaintiff; that at the time of plaintiff's alleged injury or injuries as claimed in said complaint, said helper carefully, cautiously and persistently performing the duties of his employment in that respect, noticed and observed the approach of said car; that said car was completely stopped at a considerable distance from the point at which this plaintiff was then engaged in his said labor and that thereupon said helper did notify and warn this plaintiff of the approach of said car; that said car had stopped and was waiting for him; the said plaintiff to assume a place of safety; that this plaintiff thereupon and after receiving said warning by said helper, carelessly, negligently, deliberately and without the exercise of due or any care or caution for the protection of his personal safety, refused to remove himself or to move at all, and did thereupon and after receiving said warning order and direct said helper to signal the person or persons in charge of said car or cars to proceed and to run by and over the place where this plaintiff was then working as described in said complaint.

Denies that as a direct result of burns to plaintiff's left hand and

arm as in plaintiff's complaint described, this plaintiff is weakened and crippled and his left hand rendered useless; denies that 18 said alleged condition of this plaintiff as described in said complaint, has and will continue to disable this plaintiff from following his vocation as boiler maker, steel foundry business and skilled workman. Denies that plaintiff's fingers and thumb on his left hand are drawn out of shape and are useless in performance of manual labor requiring the use of the same, and that his right hip is greatly injured and his left leg is injured, and that on account of said injuries the plaintiff has been and is greatly disfigured, scarred, crippled and permanently injured; and in this connection defendant alleges.

That the injury or injuries sustained by this plaintiff at the time and place mentioned and described in said complaint were and have been successfully and scientifically treated under the care and direction of competent surgeons and physicians and that said injury or injuries have been completely and successfully cured, save and except a slight contraction of the third and fourth fingers of the left hand, producing what is commonly known as a claw-hand. That the said state of said left hand and its condition of being a claw-hand are not permanent, incurable or such as to permanently disable or incapacitate this plaintiff from following his vocation as a boiler maker, steel foundry business and skilled workman, as in said complaint alleged or other gainful employment of like nature in which this plaintiff is skilled. That said state of said left hand and condition of being a claw-hand could have been, may now be or at any reasonable time in the future may be successfully treated and operated upon and such state and condition wholly and entirely removed by surgical operation which would cause no serious suffering or risk and would restore the original capacity for work and usefulness of said left hand; that such operation is advisable and that this plaintiff 19 has been advised by competent physicians and surgeons that such operation was desirable and necessary and would restore the original capacity for work in said left hand and its original usefulness and would cause no serious suffering or risk; that this defendant has offered and does now offer to pay all expenses necessary and attendance upon such operation but that this plaintiff has at all times and does now unreasonably refuse to submit himself to such operation.

5.

Admits that at the time of plaintiff's said injury or injuries plaintiff was engaged in manual and mechanical labor in the employment of this defendant as in said complaint alleged; denies that said injury or injuries were a result of an accident due to a condition of the occupation and of a place where the plaintiff was at work as in said complaint described or at all; denies that said injuries were not caused by the negligence of this plaintiff; denies that said injury or injuries as in said complaint described or otherwise, were the natural and proximate result of the condition or conditions of the employment in defendant's smelter of this plaintiff



in and of the place of the performance of said work as in said complaint alleged or otherwise.

## 6.

Defendant denies generally and specifically each and every, all and singular the allegations in said complaint contained, not herein specifically admitted or qualified.

Further answering said complaint, defendant alleges and shows the court:

## I.

20 \*(That defendant was not guilty of any negligence or any improper conduct toward this plaintiff, as in said complaint alleged, or in any other way or manner, or at all, but,) That the injury or injuries received by this plaintiff, as alleged in said complaint or otherwise, if any there were, were received wholly and entirely by reason of plaintiff's want of proper care and caution, and due or any regard for himself in looking out for his own safety, and by reason of his carelessness and negligence in this, to-wit:

1. That this plaintiff was on said 28th day of December, 1914, and for sometime prior thereto had been in the employ of this defendant, at its new smelter near the Town of Clifton, County of Greenlee, State of Arizona, as a workman in what is commonly known as Repair Gang. That it was the duty of such Repair Gang and of plaintiff to make repairs and alterations, do and perform all work of such kind and nature in and about said smelter as should from time to time be authorized and directed by defendant.

2. That the defendant provided persons of the highest skill and competency or foremen to oversee and direct said work of said repair gang, and to properly instruct the members of said repair gang, and said plaintiff when and where and the manner in which to do such work. That it was the duty of the members of such repair gang, and of this plaintiff, to execute the directions of said foreman, and strictly to conform to directions of said foreman as to ways and means of performing such work, and carefully and prudently to obey and observe all instructions and warnings of such foreman for the personal safety of said repair gang, and for the skillful and workman-like manner of performing such work.

21 3. That on or about said 28th day of December, 1914, defendant acting by and through said foreman, instructed plaintiff to make certain alterations and repairs on what is known as the fettling floor in said smelter, and to place in and about certain hoppers, situate immediately under said fettling floor, angle-irons for the purpose of making said hoppers dust proof, as alleged in plaintiff's complaint. That the foreman of said repair gang conducted plaintiff to the place and places of said work and instructed plaintiff in the manner in which said work should be done, and in particular instructed, directed and ordered this plaintiff to do said work from the top of said fettling floor, and not to

go down into said hoppers, below said fettling floor, and below said broad gauge tracks, upon which this defendants from time to time operated what is known as a Calcine Car, described in plaintiff's complaint. That said instructions were given this plaintiff for the purpose of best securing his personal safety.

4. That being so warned and instructed, this plaintiff deliberately, carelessly and negligently, against said expressed warnings and instructions, and without the knowledge and consent of this defendant, did in the performance of work, refuse to remain upon the top of said fettling floor, but did go down into said hoppers below said fettling floor, and below and between said broad gauge tracks, upon which said Calcine Car was operated, as fully described in detail in plaintiff's complaint.

5. That it was wholly unnecessary in the performance of such work for plaintiff to enter said hopper and to go below said fettling floor and below and between said broad gauge tracks. That the skilful and workman-like manner in which to perform such work, was from the top of said fettling floor, as plaintiff had been fully warned and instructed, as aforesaid. That it was gross negligence for plaintiff to disregard said warnings and instructions and to go down into said hoppers and below said fettling floor and below and between said tracks upon which was operated said calcine car. That this plaintiff had worked for many years in and about smelters and smelter plants and for a long time had worked in defendant's new smelter, and well knew that said calcine car was frequently from time to time operated along said broad gauge tracks, and so informed, plaintiff well knew the danger in going down into said hopper, below said fettling floor and below and between said tracks.

6. That defendant furnished and provided this plaintiff with a helper, able-bodied and fit to perform his work as such helper; that it was one of the duties of said helper to watch for and observe the approach of the cars propelled by electricity and loaded with hot calcine as mentioned and described in plaintiff's complaint and to warn this plaintiff of the approach of such cars and to signal and stop the person or persons in charge of and operating said cars to give this plaintiff an opportunity to take and assume a place of safety for the purpose of allowing said cars to approach and pass on without injury or harm to this plaintiff; that at the time of plaintiff's alleged injury or injuries as claimed in said complaint, said helper carefully, cautiously and persistently performing the duties of his employment in that respect, notified and observed the approach of said car; that said car was completely stopped at a considerable distance from the point at which this plaintiff was then engaged in his said labor and that thereupon said helper did notify and warn this plaintiff of the approach of said car; that said car had stopped and was waiting for him, the said plaintiff to assume a place of safety; that this plaintiff thereupon and after receiving said warning by said helper, carelessly, negligently, deliberately and without the exercise of due or any care or caution for the protection

of his personal safety, refused to remove himself or to move  
23 at all, and did thereupon and after receiving said warning  
order and direct said helper to signal the persons or persons  
in charge of said car or cars to proceed and to run by and over  
the place where this plaintiff was then working as described in said  
complaint.

7. That plaintiff for some days before said 28th day of December, 1914, had been engaged upon like work on said fettling floor, and had placed said angle-irons in and about many other like hoppers, below said fettling floor and between said broad gauge tracks. \*(Defendant is now informed and believes and upon such information and belief asserts the fact to be, that this plaintiff while so engaged upon said other and similar work, was from time to time interrupted by the operation of said calcine car; that at each of said interruptions said calcine car was stopped before running by and over the place where plaintiff was so engaged; that plaintiff was on each of said occasions warned of the approach of said car, and upon each of said occasions, well knowing the danger attendance upon remaining below said fettling floor and below and between said broad gauge tracks, while said car was operated over and above plaintiff, promptly accepted said warning and withdrew from said place of danger to a place of safety.)

## II.

Further answering said complaint, defendant alleges that by reason of the matters and things hereinabove set forth, the claimed injury or injuries of plaintiff, if any there were, either as alleged in said complaint or otherwise, were occasioned wholly by, and resulted from the usual and ordinary risks, and from the unusual and extraordinary risks, deliberately, voluntarily, negligently and carelessly assumed by plaintiff, of the employment in which plaintiff was engaged at said time and place of his said injury  
24 or injuries, which said risks were wholly assumed by plaintiff by entering upon and continuing in said employment.

That said risks were wholly known to and appreciated by plaintiff in entering upon and continuing in said employment, or by the exercise of reasonable diligence on the part of plaintiff should have been fully known to and appreciated by him, and that said injury or injuries did not in any respect or at all, result from, or were in any degree occasioned by any neglect or default on the part of this defendant, either as alleged in said complaint or otherwise.

## III.

Further answering, defendant further asserts that plaintiff's said injury or injuries did not in any respect or at all result from, or were in any degree occasioned by any neglect or default on the part of the defendant, its officers, servants, employees or other agents, either as alleged in said complaint or otherwise; that if it be held that plaintiff may maintain this action or may recover anything herein,



against this defendant, entirely without fault, this defendant would thereby be deprived of its property without due process of law, and would thereby be denied the equal protection of the laws of the State of Arizona, all of which is contrary to the Constitution of the State of Arizona, and to the Fourteenth Amendment of the Constitution of the United States of America.

Wherefore, defendant having fully answered, prays that plaintiff take nothing by his action, and plaintiff be hence dismissed with its costs herein expended.

W. C. McFARLAND,  
H. A. ELLIOTT,  
*Attorneys for Defendant.*

Endorsements: No. 39 Tucson. In the District Court of the United States for the District of Arizona. Joseph B. Hammer, vs. The Arizona Copper Company, Limited, a corporation. First Amended Answer. Filed Nov. 2, A. D., 1915, at 10:30 A. M. George W. Lewis, Clerk, by Effie D. Botts, Deputy Clerk.

24½ \*(NOTE.—Denoted amendments made to original First Amended Answer.)

25 In the United States District Court for the District of Arizona.

JOSEPH B. HAMMER, Plaintiff,  
vs.

THE ARIZONA COPPER COMPANY, LIMITED, a Corporation, Defendant.

*Motion to Strike.*

Comes now The Arizona Copper Company, Limited, the defendant in the above entitled cause and moves the Court for an order to strike all that portion of plaintiff's amended complaint.

First. Beginning with the words, "that if said levers are not kept in the proper place" on line 7 page 3 and ending with the words, "as herein alleged" on line 10, same page.

Second. Beginning with the words, "and which had insufficient brakes" on line 16 page 4 and ending with the words, "unable to escape therefrom" on line 23 same page.

Third. Also beginning with the words, "that on account of" on line 5 page 5 and ending with the words, "was performing said work" line 8, same page.

on the ground that said portions of said amended complaint are irrelevant and redundant and constitute no part of a cause of action based upon Chapter 6, Title 14, of the Revised Statutes of Arizona, 1913.

W. C. McFARLAND.  
H. A. ELLIOTT,  
*Counsel for Defendant.*

Endorsements: No. 39 Tucson. In the United States District Court for the District of Arizona. Joseph B. Hammer, Pl'ff, vs. The Arizona Copper Co., Def. Motion to Strike. Filed November 22, 1915. George W. Lewis, Clerk, by Effie D. Botts, Deputy.

26 In the United States District Court in and for the District of Arizona.

Minute Entry Made on Wednesday, November 24th, 1916.

No. 39, Tucson.

JOSEPH B. HAMMER, Plaintiff,

vs.

THE ARIZONA COPPER COMPANY, LIMITED, a Corporation, Defendant.

Comes now the defendant herein by W. C. McFarland, Esquire, and H. A. Elliott, Esquire, its attorneys, and moves the Court to strike from the amended complaint of the plaintiff herein certain particulars therein contained, and thereupon said motion is confessed on all three grounds of the motion to strike by the plaintiff, appearing by his counsel, L. Kearney, Esquire, and Frank E. Curley, Esquire, and by leave of the Court plaintiff is given leave to amend his amended complaint on page 4, line 15 by striking out after the word "When", all that portion down to and including the words "escape therefrom" on line 23, and inserting in lieu thereof the words "large quantities of said hot calcine then being carried in one of defendant's cars, as aforesaid, escaped and fell into said hopper occupied by plaintiff and over and upon plaintiff."

27 In the United States District Court for the District of Arizona.

Minute Entry Made on Wednesday, November 24, 1915.

No. 39, Tucson.

JOSEPH B. HAMMER, Plaintiff,

vs.

THE ARIZONA COPPER COMPANY, LIMITED, a Corporation, Defendant.

Comes now the defendant herein by counsel and demurs to the amended complaint of the plaintiff on the grounds set out in said demurrer heretofore filed as to the original complaint and contained in defendant's amended answer, and upon consideration by the Court it is ordered that said demurrer be and the same is hereby over-ruled, to which ruling of the court, defendant excepts.

28 In the United States District Court in and for the District of Arizona.

Minute Entries Made During Trial, Tuesday, November 23rd, 1915.

No. 39, Tucson.

JOSEPH B. HAMMER, Plaintiff,

vs.

THE ARIZONA COPPER COMPANY, LIMITED, a Corporation, Defendant.

This case came on regularly for trial on this day, the plaintiff appearing in person and with counsel, L. Kearney, Esquire, and Frank E. Curley, Esquire, and the defendant appearing by its counsel, W. C. McFarland, Esquire, and H. A. Elliott, Esquire, and both parties announce ready for trial. A jury of eighteen was called, sworn and examined as to their qualifications. Ozro A. Haskins was excused by the Court and Charles H. Dodge was called, sworn and examined in his place. The eighteen jurors now in the jury box were all found to be qualified and accepted by both sides. The hour for adjournment having arrived and the trial of this case not having been completed, the Court duly admonished the jury and excused them from further attendance upon this court until Wednesday, the 24th day of November, 1915, to which time the further trial of this case is now ordered continued.

Wednesday, November 24th, 1915.

The trial of this case having been continued from a previous session of this Court, comes now all the parties hereto, and comes also the eighteen jurors empaneled on yesterday, plaintiff strikes three and defendant three, and the remaining twelve, to-wit: C. 29 F. Winters, James Agee, L. D. Johnson, O. Z. Kane, L. G. Moore, Percy Rider, J. C. Wheat, Albert Brockman, B. M. Pachó, Francis A. Odermatt, Charles H. Dodge and Henry Meyer, Jr., were called and sworn to well and truly try the issues joined herein. Plaintiff invokes the rule excluding all witnesses, except those giving expert testimony and the plaintiff, from the court room during the trial of this case and said motion is not resisted by the defendant, and plaintiff's witnesses, Mrs. Joseph B. Hammer and Elmer Bentley, and defendant's witnesses, Mauro Provencio, Estanislado Provencio, Gustavo Provencio, A. B. Jones and George Frazier were called, sworn and put under the rule. H. C. Nixon was sworn as court reporter in this case. L. Kearney, Esquire, reads plaintiff's amended complaint and makes opening statement. H. A. Elliott, Esquire, reads defendant's first amended answer and makes opening statement. Upon motion of defendant, defendant is given leave by the court to amend its first amended answer on page 5, line 32, paragraph 4, beginning with the words "But denies" by striking out the remainder of said paragraph down to and including the words

"or at all" on page 6, and by striking out on page 6, beginning with the word "But" at the end of line 15 of first amended answer, down to the words "and denies" on line 20 of said amended answer and by striking out on page 9, line 30, beginning with the word "That" down to and including the word "but" in line 1 on page 10. Plaintiff moves the Court to strike from defendant's first amended answer all of paragraph 7 on page 13 commencing with the word "defendant" on line 10 down to and including the words "place of safety" in line 23, which motion was sustained by the Court, to which ruling of the court, defendant excepts. Plaintiff demurs to paragraph 2 and 3 on page 13 and 14 of defendant's first amended answer and said demurrer is sustained by the court, to which ruling of the Court, defendant excepts. The plaintiff then to maintain upon his part the issues herein called as witness Joseph B. Hammer, who was duly sworn, examined and cross-examined. Plaintiff asks leave of the Court to amend his amended complaint by inserting on page 5, line 2, after the word "same" the words "and his stomach", and same is granted by the Court, to which ruling of the Court, defendant excepts. Plaintiff's exhibits, A, B, C, D and E, were admitted and filed. Elmer Bentley was called as a witness examined and cross examined. It is stipulated by counsel that John Holtz, if present, would testify as set out in the written stipulation on file in this case. It is stipulated by counsel in open court that the average length of life of a man of fifty years of age is twenty years. Dr. Mead Clyne was called as a witness for plaintiff, sworn, and examined in part. The hour for adjournment having arrived and the trial of this case not having been completed the court duly admonished the jury and excused them from further attendance upon this case until Friday, the 26th day of November, A. D., 1915, to which time the further trial of this case is now ordered continued.

Friday, November 26th, 1915.

The trial of this case having been continued from a previous session of this Court, comes now all the parties hereto, and comes also the jurors herein, their names are called and all answering thereto respectively, the further trial of this case proceeds as follows: Dr. Mead Clyne was called to the stand for further examination in chief and was examined and cross examined. Dr. I. E. Huffman was called as a witness for the plaintiff, sworn, examined and cross examined. It is stipulated in open Court that Dr. Huffman is a practicing physician and qualified to testify. Mrs. Joseph B. Hammer was called as a witness, examined and cross examined, and thereupon the plaintiff rested his case. The defendant then to maintain upon its part the issues herein recalled for further cross-examination Joseph B. Hammer and Elmer Bentley and called as witness Estaislado Provencio, George W. Frazier, Mauro Provencio, Gustavo Provencio and A. B. Jones, who were examined and cross examined, and introduced in evidence Defendants Exhibit No. 1 which was admitted and filed. Plaintiff's Exhibit F was admitted and filed. The hour for adjournment having arrived and the trial of this case not having been completed,

the Court duly admonished the jury and excused them from further attendance upon this case until Saturday, the 27th day of November, A. D., 1915, at 9:30 o'clock A. M., to which time the further trial of this case is now ordered continued.

Saturday, November 27, 1915.

This case having been continued from a previous session of this Court, comes now all the parties hereto, and comes also the jurors herein, their names are called and all answering thereto respectively, the further trial of this case proceeds as follows: Gustavo Provencio was recalled by the defendant for the purpose of correcting his testimony given on yesterday. A. B. Jones and Maurc Provencio were called by the defendant for further examination. Defendant reads statement that if Harry Neilson were present he would testify as set out in affidavit on file herein. Dr. J. I. Butler was called as witness by the defendant, sworn, examined and cross-examined, and thereupon the defendant rested its case. Plaintiff called in rebuttal, Elmer Bentley and Joseph B. Hammer, who were further examined and cross-examined, and thereupon the plaintiff rested his case. The defendant then moves the Court to direct a verdict in this case in favor of the defendant:

1st. Because the evidence submitted does not sustain a verdict or support a judgment in this cause.

2nd. Because all the evidence in the cause shows that if the plaintiff received any injury at the day and date alleged in his complaint that such injury was the result of his own negligence.

3rd. Because the evidence in the cause shows by an overwhelmingly preponderance that a verdict on the cause of action alleged in the complaint should be for the defendant.

which said motion is submitted to the Court and upon consideration thereof by the Court, said motion is denied, to which ruling of the Court, defendant excepts. There being no further testimony offered by either side and the evidence being closed, argument of respective counsel was had and the Court instructed the jury orally and said jury retired in charge of L. V. Russell, Bailiff, officer of this Court, first duly sworn for that purpose to consider their verdict. And subsequently said jury return into Court, their names are called and all answering thereto respectively upon being asked if they have agreed upon a verdict, report that they have agreed and thereupon present the following verdict:

"JOSEPH B. HAMMER, Plaintiff,

vs.

ARIZONA COPPER COMPANY, LIMITED, a Corporation, Defendant.

*Verdict.*

We, the jury, duly empaneled and sworn in the above entitled cause, upon our oaths do find for the plaintiff and assess his damages at \$12,000.

O. Z. KANE, *Foreman.*"

jury is discharged from this case and it is ordered entered in accordance with said verdict.

No. 39, Tucson.

JOSEPH B. HAMMER, Plaintiff,  
against  
COMPANY, LIMITED, a Corporation, Defendant.

*Verdict.*

fully empaneled and sworn in the above entitled  
ths, do find for the plaintiff and assess his damages

O. Z. KANE, *Foreman.*

No. 39 Tucson. United States District Court, Dis-  
Joseph B. Hammer, Plaintiff, vs. Arizona Copper  
rporation, Defendant. Verdict. Filed Nov. 27,  
Lewis, Clerk, by Effie D. Botts, Deputy Clerk.

istrict Court of the United States for the District  
of Arizona.

JOSEPH B. HAMMER, Plaintiff,  
vs.  
COPPER COMPANY, LIMITED, a Corporation,  
Defendant.

*Judgment.*

e on regularly for trial the 23d day of Novem-  
ntiff being present and represented by his attor-  
Esq., and Frank Curley, Esq., and the defendant  
by its attorneys W. C. McFarland and H. A.  
twelve men were regularly impanelled and sworn  
Witnesses on the part of plaintiff and defendant  
xamined and documentary evidence on the part  
plaintiff was introduced. After hearing the evi-  
nt of counsel and the instruction of the court the  
sidering of their verdict and subsequently on the  
mber 1915, returned into court and being called  
names and say that they find the verdict for the  
st the defendant in the sum of twelve thousand

virtue of the law and by reason of the premises  
ered and decreed and adjudged, that the plaintiff  
r, do have and recover of and from said defend-  
Copper Company, Limited, a corporation, the sum

of twelve thousand (\$12,000) dollars with interest thereon at the  
rate of six (6%) per cent per annum from date hereof until paid  
together with the plaintiff's costs and disbursements incurred in  
this action amounting to the sum of \$166.45 with interest thereon  
at six (6%) per cent per annum from date hereof until paid,  
35 and for which let execution issue.

Judgment rendered November 27th, 1915.

Endorsements: In the District Court of the United States for the  
District of Arizona. No. 39 Tucson. Joseph B. Hammer, plain-  
tiff, vs. The Arizona Copper Company, Limited, a corporation, De-  
fendant. Judgment. Filed November 29, 1915. George W. Lewis,  
Clerk, by Effie D. Botts, Deputy.

36 In the United States District Court for the District of  
Arizona.

JOSEPH B. HAMMER, Plaintiff,  
vs.

THE ARIZONA COPPER COMPANY, LIMITED, a Corporation,  
Defendant.

*Proposed Bill of Exceptions.*

Be it remembered that on the 23rd day of November, A. D., 1915,  
at a regular and stated term of the United States District Court for  
the District of Arizona, the same being one of the regular judicial  
days of the November term of said court, 1915, begun and holden  
in the City of Tucson, Arizona, before his Honor, William H. Saw-  
telle, District Judge, the issues joined by the pleadings in said cause  
came on to be tried by the said Judge and the jury empanelled and  
sworn to try the issues in said cause. The plaintiff was repre-  
sented by L. Kearney and F. E. Curley, his attorneys, and the de-  
fendant by W. C. McFarland and H. A. Elliott, its attorneys.

To sustain the issues on the part of the plaintiff and on the part  
of the defendant, the following evidence was introduced.

37 In the District Court of the United States District of  
Arizona.

Case No. 39.

JOSEPH B. HAMMER, Plaintiff,

vs.

THE ARIZONA COPPER COMPANY, LIMITED, a Corporation,  
Defendant.

Before Honorable William H. Sawtelle, Judge.

TUCSON, ARIZONA, November 23rd, 1915.

TRANSCRIPT OF TESTIMONY.

Appearances:

For the Plaintiff L. Kearney, F. E. Curley.

For the Defendant W. C. McFarland, H. A. Elliott.

Be it remembered, that this cause came duly on for trial in the above-entitled court before the Judge presiding therein, and a jury duly empanelled and sworn to try the issues, on Tuesday, November 23rd, at 1:30 P. M. Whereupon the following proceedings were had and testimony adduced, to-wit:

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*Index.*

Plaintiff's Witnesses.

	Direct.	Cross.	Redirect.	Recross.
Joseph B. Hammer . . . . .	Page 9	Page 34	Page 53	..
	..	83	84	..
Elmer Bentley . . . . .	54	60	..	..
	..	85	..	..
Meade Clyne, M. D. . . . .	63	67	..	..
I. E. Hoffman, M. D. . . . .	74	76	77	..
Jane E. Hammer . . . . .	77	80	82	82

Defendant's Witnesses.

	Direct.	Cross.	Redirect.	Recross.
Estanislado Provencio . . . . .	86	94	100	101
George W. Fraser . . . . .	101	119	123	..
Mauro Provencio . . . . .	124	132	136	..
	151	..	..	..
Gustavo Provencio . . . . .	137	140	..	..
	149	150	150	..
A. B. Jones . . . . .	143	146	148	..
	150	151	151	..
Harry Neilson . . . . .	152	..	..	..
Joel Ives Butler, M. D. . . . .	154	157	159	..



## Plaintiff's Rebuttal.

	Direct.	Cross.	Redirect.	Recross.
Elmer Bentley .....	160	166		
Joseph B. Hammer .....	166	170	..	..

Charge to Jury: Pages 172-178.

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WEDNESDAY, NOV. 24th, 1915: 9:30 a. m.

The Court: You may proceed.

(Counsel for plaintiff reads his complaint.)

The Court: Do you desire to make a statement or not?

Mr. Kearney: Why, just briefly, a few words. Let's see; the first and second allegations of this complaint are admitted?

Mr. McFarland: Oh, as to the organization, yes, we admit that.

Mr. Kearney: Now, gentlemen, we will show by the evidence that the Arizona Copper Company runs a smelter, which concern employs a good many men, and a part of this smelter was what is known as a feed-floor, which is elevated above eighteen feet above the ground; that it has tracks running from a certain point some distance away where they grind up rock, and this is taken from there, and then, I think there are two of those large electric cars which run down these tracks from that place and come down onto the feed-floor. The feed-floor is just above—for instance, we will say the furnaces are underneath here, right here, (indicating), and right along three under the floor are these hoppers about twenty-eight inches wide and thirty inches deep. Now at the time that I indicated the cars start from are roasters, and this calcine is brought from these roasters in this car and is carried across this feed-floor. In this car there are valves, or slides, and these valves are controlled and pulled open, letting the calcine through an opening in the bottom of this car, and this calcine, which is red-hot—not only warm—red-hot, is dumped into these hoppers and shoved on into the furnaces. Now at the time the plaintiff was working there at that point, and it is admitted that he was employed at the time and was working there, that he was putting iron plates in this hopper to make it dust-proof, and these plates had to be riveted; that he was working in this hopper and in the performance of his work it was absolutely necessary for him to be in these hoppers, and make the measurements.

Mr. McFarland: If the Court please, I think that is improper to state.

Mr. Kearney: We state we are going to prove this.

Mr. McFarland: That is a question for the jury.

The Court: No, as I understand it, he is stating what he expects to prove.

Mr. McFarland: I did not understand it that way.

Mr. Kearney: We intend to offer testimony to that effect.

The Court: That is what you expect to prove?

40 Mr. Kearney: That is what we expect to prove. And while he was in there at work—of course, it is a narrow place in



there for a man, say, my size or the size of Mr. Hammer here. When he is in there he fills up all the space, and he cannot turn around in there very quickly. And this car comes on down from the road with this hot calcine in it, comes on down to this point where he was at work, and from some cause or other—I don't know what caused it—you will hear all about that—the bottom of this car filled with hot calcine suddenly opened dumping it upon him. The car came on up and when it got over about where Mr. Hammer was working this hot calcine was caused to pour out upon him. Mr. Hammer had nothing to do with the running of the car. There was another person in charge of the car, and his business there was fixing this hopper. There were other employees who had charge of the car that brought this hot calcine down, and let's see, I think there was probably a helper with him there, a Mexican boy that they had furnished. And we also claim that we will show if the valves had been properly taken care of, or slides in that car, that that calcine would not have poured out at that place on the plaintiff.

Mr. McFarland: If the Court please, I think that is improper for the reason that there is *not* allegation in the complaint that there was improper care or negligence of the defendant or its agents or servants in that respect. He says if it had been properly taken care of it would not have released the calcine. Now the question of care and negligence is the feature I object to. Counsel is telling the jury that he expects to prove this, and I object to it for the reason that there is no allegation in his complaint to that effect.

The Court: I think that objection is well taken. Counsel may state what he expects to prove, or the conditions as they were in existence, and then let the jury draw the conclusion whether or not the plaintiff himself was negligent. If the plaintiff wasn't negligent, why, then the other questions, of course, will be submitted to the jury.

Mr. Kearney: Mr. Hammer is a boiler-maker and an iron-worker, and he is called in there to fix this hopper and make it dust-proof. If there is any job there of iron work or bar work, he is called to another place to perform the work, and we will show and prove here that the dropping of the calcine into this hopper and burning the plaintiff, the plaintiff himself had no concern in that. It was an accident that he himself did not bring about. He didn't pour calcine upon himself, and when the calcine commenced pouring upon him the car which contained the calcine was right over him and there was no chance for him to get out. Then he screamed and tried to push the car ahead, run the car ahead, thinking perhaps that he could get out of there. He had to get out right where the car came over him there. And so the car finally passed over him and there were some fellows there when the car passed over him came and helped him out of there. And we expect the testimony to show that he hollered to push the car over, push the car over where he was working. At that time the calcine had already spilled upon him, and the only means of his getting out of there, or to prevent being roasted alive was to have that car pass over him so

41 that he could get out, pass out of that hole. And I think the testimony will show that he is permanently injured. He was a boiler-maker and iron-worker, and having received a good many burns about his body, his left hand is practically ruined; and that he is a skilled workman. That is about as far as I wish to go in making a statement of what we expect to prove. I thank you, gentlemen.

Mr. Elliott: If the Court pleases, and gentlemen of the jury, I will now read the defendant's answer to the merits of plaintiff's complaint.

The Court: Just state from what page you are reading.

Mr. Elliott: On page 4 I believe, or five, as it appears there, immediately following the demurrers.

The Court: Commencing with the word "denies" down to the words,—to and including the words, "or at all", may be stricken out of the answer.

Mr. Curley: Beginning with "but denies" on the bottom of page 5.

The Court: No, commencing with the word "denies" on page 6.

Mr. Curley: No, but beginning on the bottom of page 5 with the words, "but denies that this defendant or its officers, agents or servants," etc., "propelled by electricity and loaded with hot calcine, without notice or warning," that whole thing should come out.

Mr. Elliott: All the denials of negligence and carelessness.

The Court: That was in response to the paragraph of the complaint—

Mr. Curley: Of the original complaint.

The Court: That was stricken out on your motion, as I understand it.

Mr. Elliott: Yes, sir.

The Court: That may go out also.

Mr. Elliott: All denials of negligence or carelessness?

The Court: Commencing with the words, "but denies" on the last line of page 5, and including all of that paragraph down to and including the words, "or at all" on page 6.

Mr. Elliott: Line 14?

The Court: Line 14, yes. Thirteen on this copy.

Mr. Elliott: Yes, "admits that plaintiff received"—

The Court: "By the negligence of this defendant".

42 Mr. Curley: That ought to come out. That is negligence, down to the word "agents".

The Court: Down to and including the words, "or their agents".

Mr. Curley: Yes, on line 20.

The Court: Commencing with the words, "admits that plaintiff," on line 14 of page 6 of the answer—

Mr. Curley: Beginning with the word "but", your Honor, at the end of line 15—"but denies that said burns or injuries and the effects or results thereof, as described in said complaint," etc. In other words, lines 14 and 15 "admits that plaintiff received certain burns from said hot calcine mentioned and described"; that is proper; beginning with the word "but".

The Court: You will have to change the wording of that paragraph.

Mr. Elliott: It should read then, your Honor, "admits that plaintiff received certain burns from said hot calcine mentioned and described in said complaint, but denies that the injury or injuries of this plaintiff, if any he has received," skipping down to line 20.

The Court: "And the effects or results thereof", do you move to strike that out?

Mr. Curley: No, he is skipping from the word "complaint" line 15, to the word "denies" on line 20.

The Court: What do you want to strike out there?

Mr. Elliott: I suggest, your honor, that we strike out beginning with the word "but" at the end of line 15.

The Court: Very well.

Mr. Elliott: Down to "and denies" at line 20.

The Court: It may be stricken out on motion of defendant. Now you had better commence with line 14 again and read it as amended.

Mr. Elliott (reading): "Admits that plaintiff received certain burns from said hot calcine mentioned and described in said complaint, but denies that the injury or injuries to this plaintiff, if any, he has received, as described in said complaint, or at all, were caused by the condition or conditions of plaintiff's occupation.

\* \* \* Further answering said complaint, defendant alleges that the injury or injuries received by this plaintiff as alleged in said complaint, or otherwise, if any there were, were received wholly and entirely by reason of the plaintiff's want of"——

43 The Court: Strike out beginning with line 30 on page 9 to and including the word "but", line 1, page 10.

(Counsel for defendant continues reading answer down to and including the words, "Such occasions, well knowing the danger".)

Mr. Kearney: If the Court please, I move to strike that out. He wouldn't be permitted to prove that on the trial, that plaintiff was negligent on some occasions, or the plaintiff was careful on other occasions. It is not a matter of proof in this case. He can only prove at the time this happened. A man may be ever so careful on some occasions and may be negligent on others. The fact that he may have been careful or negligent on other occasions is not a fact you can prove in this case. In the Circuit Court of Appeals in Clark vs. The Arizona Railroad, they expressly held that you could not prove whether the plaintiff was negligent on other occasions, or careful on other occasions, but you must confine the proof to that one particular time, whether he was careful or negligent then. It cannot be proved in this case that he was careless on other occasions. He may have been careless on other occasions and on this occasion been very careful. That does not establish the fact of negligence at all.

Mr. Elliott: While perhaps that does show whether he was careful or negligent on other occasions, it also shows what was the custom of Mr. Hammer as to what was necessary for him to do on other similar occasions.

The Court: Well, custom would not be admissible, but if the plaintiff at other times removed himself from places of danger, would not that be?

Mr. Kearney: No, that is what the Circuit Court of Appeals holds that you cannot do. You cannot introduce testimony of other occasions at all. It is confined to the particular time of the injury.

The Court: Would it not be admissible for the purpose of showing his knowledge of the danger incident to his remaining at that place?

Mr. Kearney: It is not admissible for any purpose. You simply allege negligence at a particular time. All negligence or carelessness at other times is eliminated, and we are confined to that particular time and place, or particular injury, and nothing else.

Mr. McFarland: If your Honor please, the rule stated by counsel is correct, but that isn't this case. That is where you seek to show upon other occasions a different line of work, possibly, and under different circumstances, that he had been either careful or negligent but this case, in this particular case that rule does not apply because this is a continuation of the same work at the same time and the same place. What did he do when the calcine car came up to him when he was fixing other hoppers? He got out, on notice from his helper. Why? Because he realized it was dangerous to remain in there—on the theory that one who knows of a danger and continues in the employment of the employer, without  
44 objection, assumes the risk. He takes the risk. He would take the risk, he said to his helper when he told the helper to tell the motorman to come on. He said "I will take the chance." He took it; he takes the consequences. That is the assumption of risk.

The Court: Assumption of risk has no place in this case at all. You may show whether or not the plaintiff was negligent. What in your motion? Do you demur to that or do you move to strike?

Mr. Kearney: We move to strike it out. The Circuit Court of Appeals expressly referred to it there. It was one of the main issues in the Circuit Court.

The Court: Well, I will sustain the motion and will give you the benefit of an exception.

Mr. McFarland: Please note our exception to the action of the Court. If your Honor, please, in this connection, before I forget it, may I ask that our exception be noted to the action of the Court in overruling the demurrers to the amended complaint.

The Court: You may note the exceptions to the ruling of the Court on all pleadings.

Mr. McFarland: On overruling the demurrers to the amended complaint.

The Court: And also to the action of the Court in sustaining plaintiff's motion to strike.

Mr. Curley: That practically takes in all of paragraph 7 of page 13, I think.

Mr. Elliott: There is nothing other in that paragraph 7, I believe, your Honor.

The Court: No, the fact that the defendant alleges that the plaintiff had been engaged upon like work may stand.

Mr. Curley: You mean you will strike out then beginning with the word "defendant" on line 10?

The Court: I have sustained a motion to strike all that portion of paragraph 7 on page 13 of defendant's answer, commencing with the word "defendant" on line 10 and including the words "place of safety" on line 23, and you except to the ruling of the court.

Mr. McFarland: To which ruling of the Court we except.

The Court: Proceed.

(Counsel for defendant continues reading answer to and including the words, "by entering upon and continuing in said employment.")

Mr. Curley: We move to strike all of that paragraph.

45 The Court: Read the next paragraph and see whether that should not go out also.

Mr. Elliott (reading): "Further answering, defendant further asserts on the part of "defendant" that should be instead of "plaintiff."

Mr. Curley: I move to strike out both of those.

The Court: I cannot sustain a motion to strike, but I will permit you to file a demurrer to those paragraphs.

Mr. Curley: Well, at this time I will give notice that I will demur to the second paragraph, and I will put in a demurrer, a demurrer generally that it does not constitute any defense to the action.

Mr. McFarland: If the Court please, the pleadings are in such shape that it seems as if there will be a good deal of confusion in trying a case with the pleadings in this shape. I think the pleadings that we go to trial upon should be in a shape difference from this, for the convenience of the Court and understanding of the jury, and the counsel, as well. We have not filed an amended answer in this case because we did not know what to do until the ruling on the motion to strike was made. That upsets our answer and upsets the complaint, and puts the pleadings in bad shape. I think we could remedy that in a little while.

Mr. Curley: That isn't our fault, in your Honor please. The motion to strike was only filed yesterday, and this amended complaint has been filed quite awhile.

The Court: Well, this answer has been on file, Mr. Curley, since November 1st, and the motion to strike—

Mr. Curley: The pleadings have all undergone a change, however, since that time. You see the whole question of negligence on the part of the defendant has been subsequently eliminated so that the pleadings have undergone an entire change.

The Court: This question of assumption of risk, that could have been demurred to at any time long before the motion to strike was filed. Well, I will permit you to file your demurrer.

Mr. Kearney: The demurrer is filed, if I am not mistaken.

The Court: Well, it has not been ruled upon. It has not been brought to the Court's attention if it is there.

Mr. Curley: We will ask leave to file it at this time, if the Court please.

The Court: I will give you leave to file a demurrer.

Mr. McFarland: On the question of the assumption of risk?

The Court: Yes, and also the last paragraph, the pleading that the injury was not the result of the defendant's negligence.

46 Mr. Curley: Paragraphs 2 and 3 on page—

The Court: If you desire you may re-write your answer so as to eliminate all of the paragraphs of the answer which have been stricken out, or to which a demurrer has been sustained. But you need not delay the trial. You may do that at recess. All of the defendant's answer which has been allowed has been read to the jury. Do you desire to make a statement at this time, or do you reserve your making of a statement until after the plaintiff has finished.

Mr. Curley: Do I understand that your Honor has ruled upon the demurrer that I am interposing?

The Court: Well, I said I would give you leave to interpose a demurrer and they may consider it as filed.

Mr. Curley: I thought for the purpose of saving the record we would consider it as being filed, and during the noon hour I can prepare it and file it.

The Court: I say that counsel for the defendant will consider it as filed, and you need not delay the trial. The record may show the demurrer has been filed to the last two paragraphs of the defendant's answer, and that the Court sustains the demurrer, and to that action of the Court the defendant excepts.

Mr. Elliott: That is in paragraph 7, isn't it?

The Court: Oh, yes, it is in paragraph 7, subdivisions 2 and 3.

Mr. Elliott: Subdivisions 2 and 3, paragraph 7, the demurrer is sustained. To which action of the Court the defendant excepts.

The Court: Very well.

Mr. Curley: That isn't paragraph 7. It is another one. It is another and separate answer.

Mr. Elliott: It is the 7th paragraph of Subdivision 1.

Mr. Curley: Yes, 7th paragraph, on pages 13 and 14.

The Court: Yes, the whole of each of the paragraphs 2 and 3, pages 13 and 14 of defendant's answer. If there is any question as to whether or not you have reserved exceptions to the ruling of the court on the pleadings and motions and demurrers, you may have them at any time, but so far as exceptions to the introduction of testimony, as to the competency or admissibility of the testimony is concerned, those exceptions must be noted at the time, or they will be considered as waived. The same is true as to the general charge of the Court when it comes to charging the jury. If you have any exceptions to the general charge, those exceptions must be pointed out before the jury retires.

Call you first witness.



47 JOSEPH B. HAMMER, the plaintiff herein, called as a witness in his own behalf, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Kearney:

Q. State your name.

A. Joseph B. Hammer.

Q. Where do you live?

A. Morenci, Arizona, at present.

Q. In what county is that?

A. Greenlee County.

Q. How long have you lived in Greenlee County, Arizona?

A. About three months.

Q. How long have you been living in the State of Arizona?

A. A little over three years the twelfth day of October, last October.

Q. What is your place of residence? Where do you reside, Mr.

Hammer?

A. Morenci, Arizona, now.

Q. Is that your home?

A. That is my home at present; yes, sir.

Q. Are you a registered voter there?

A. I am a registered voter at Clifton, Arizona.

Q. Did you vote at the last election there?

A. No, the election before.

Q. Where did you vote then?

A. I voted at Clifton.

A. Does your family live there?

A. Family lives there.

Q. Where were you born, Mr. Hammer?

A. Pittsburg, Pennsylvania.

Q. Have you at any time since become a citizen of any other country than the United States?

A. No sir; always been a citizen of the United States.

Q. What is your business or vocation, Mr. Hammer?

A. A boiler-maker.

Q. How long have you followed that business?

A. Oh, I followed it here for the last three years, about, in the Arizona district. I worked about three years at it in Oil City, Pennsylvania; also worked at it in Signet, Ohio.

The Court: Mr. Hammer, the direct question was asked you, how long had you worked at the trade of a boiler-maker. Now in order that we may not take up too much time, endeavor to answer the question directly so that counsel can then ask another question. How many years have you worked at your trade?

A. Seven years and a half, all-told.

The Court: Well that is all right.

Mr. Kearney:

Q. Did you have any experience as an iron-worker?

A. Yes, considerable. It comes under the boiler-making trade. A good bit of that comes under the boiler-making trade here in Arizona.

Q. How many years' experience have you had in that line?

A. Well, that goes in with the boiler-making trade.

Q. Well, as an iron worker and a boiler-maker, how many years' experience have you had altogether?

A. Seven years and a half.

Q. For the past twenty years what have you been doing?

A. Well, I have been working three years at the boiler-making trade, and the balance of the time in the steel foundries.

48 Q. Did you ever hold a position of foreman of works and plants?

A. I held a position as foreman in several of them, superintendent of several of them.

Q. Can you name any of them?

A. Yes, sir.

Q. Do so.

A. Superintendent of the Bucyrus Steel Casting Company, Bucyrus, Ohio, and night superintendent for the American Steel Foundries at Indiana Harbor, Indiana.

Q. Well were you foreman of the Gould Car & Coupler Company?

A. Foreman at the Gould, thirteen months there.

Q. How long did you work for the Arizona Copper Company?

A. Arizona Copper Company?

Q. Yes.

A. I started October the 16th, 1912, and worked continuously for them with the exception of about three weeks we were laid off and about two months when I went up to Oklahoma, up to the time I was hurt.

Q. When you went to Oklahoma, they sent for you to come back?

Mr. McFarland: Well, now, if the Court please, I think that is wholly immaterial.

The Court: Objection sustained.

Mr. Kearney:

Q. Well, did you come back from Oklahoma to work for them?

A. Yes, I came back from Oklahoma to work for them.

Q. In the vocation which you follow, as a boiler-maker and iron-worker, what wages do they pay you a day?

A. It was fifty cents an hour up to the time they made the reduction, and they brought us down to \$3.60; forty-five cents an hour.

Q. Well, before this at other places, did you receive that much wages or more?

Mr. McFarland: I object to that, if the Court please. It is not a question as to what he received at other places. The question is as to what he received at this particular place.

The Court: No, he may show what his earning capacity was.

Mr. McFarland: He can show what his services were worth, but



not what was paid him. That isn't the question. He can state what he got there and what his services were reasonable worth. What he got does not constitute the standard, but he can state that fact himself.

The Court: No, I don't agree with you. The objection is overruled.

(Question read.)

A. I received more.

Mr. McFarland: We object to the question as to what he received from other places.

The Court: The objection is overruled.

Mr. McFarland: Exception.

Mr. Kearney:

Q. What wages did you receive?

49 A. I received \$4.75 in Oklahoma, and we were getting through our work in three hours and a half—two hours and three-quarters—three hours and a half to four hours every day for the Petroleum Iron Works of Shannon, Pennsylvania.

Mr. Kearney:

Q. The usual wages paid you for the labor you performed, average daily wages, what were they?

Mr. McFarland: I object to that, if your Honor please, because it might be under different conditions and a different employment.

The Court: Objection sustained.

Mr. McFarland: And the circumstances might be entirely different.

The Court: He may show what he received as wages at the various places where he worked since.

Mr. Kearney:

Q. Since you quit work for the—have the wages of the Arizona Copper Company for the same class of work, have the wages been raised?

A. Yes.

Mr. McFarland: I object to that. Just a moment, Mr. Hammer. Whether the wages are different now or different then——

The Court: You need not argue the question, Mr. McFarland. If you will just make your objection I think I can rule on that without argument. I sustain the objection.

Mr. McFarland: If your Honor please, if your Honor will pardon me, but the courts have said, the courts of appeal, that the reasons must be given in order that they may be reviewed in the court above.

The Court: I understand the reason. If the court overrules the objection, then you may give your reasons, but when I sustain your objection do you think it is necessary to state the reasons then?

Mr. McFarland: No, sir.

The Court: Well, then, I had sustained your objection. That

wages are being paid there now is not a criterion, but what wages this plaintiff has received during the past years would be.

Mr. Curley: You- Honor, the prevailing wage at the present time, would not that be a criterion in figuring what his damages are? For instance, this injury—if this injury has disabled him from performing that work, would not the prevailing rate of wage at the present time be a criterion in figuring damages?

The Court: The trouble about that is, Mr. Curley, you do not know that this plaintiff might be at work at that place, and what would have been paid would not be a criterion.

Mr. Curley: No, but in estimating the value of his services, would not the prevailing rate of wage be a criterion in estimating  
50 the value of his services, if they have been destroyed?

The Court: That isn't the question. The question is what wages at that point were.

Mr. Kearney:

Q. What are the prevailing wages, say, in Greenlee County at the present time for the class of work that you were performing at the time you were injured?

Mr. McFarland: We object to that now, what the prevailing wages are. We have no objection to what the wages were then, but not now.

The Court: I will hear from you.

Mr. Curley: If your Honor please, in estimating a destroyed capacity, it isn't a question of what a man is earning at the time. The criterion is his ability to earn, whatever that ability, which has been destroyed, to earn is. Now at the time he was injured from force of circumstances or something else, he might have been carrying ashes at fifty cents a day, and yet he may have been a skilled workman. Now the criterion is not what he was getting at the time. The criterion is what ability to earn has been destroyed. You cannot confine him to the wage he was earning. A man may be earning fifty cents a day, and yet by reason of conditions he may have a profession that he has had destroyed that he was unable to use at that time. Now the criterion is his ability to earn.

The Court: At what place do you confine this question?

Mr. Kearney: To Greenlee County.

Mr. Curley: We are asking what is the prevailing wage at the present time in Greenlee County.

The Court: I overrule the objection.

Mr. McFarland: To which we except.

The Court: Answer the question if you know.

A. The prevailing rate, the scale, as the boiler-makers call it, is \$4.72 for eight hours. I also know of one instance where a man is getting \$4.80.

Mr. Kearney:

Q. Mr. Hammer, you state in your complaint here that you were  
3—1002

Arizona Copper Company on their new smelter at  
 underneath a track that runs from the roasters to the  
 ask you to describe this feed-floor and this track.  
 from the roasters comes in on a circle.

Have you not prepared a diagram, a plat, of the work-

I have no diagram. I suppose the other parties  
 have that, or pictures of them. If they *would* can  
 we will get through it quicker.

Part: You should have had the plaintiff prepare one  
 coming into Court, the best he could prepare it. Go  
 don't see how the jury is going to understand it,  
 now I am going to understand it from a description  
 to illustrate. Go ahead.

ney:

er, can you draw a draft of that feed-floor, or

less he can do it very quickly, I cannot suspend

y:

take but a moment, would it?

ell, go ahead. Have you a photograph of that

I have not, but I understand the defendant has

ell, that isn't the question. They haven't yet been  
 introduce anything.

l: If you- Honor please, I said we had some expert  
 case, and one is here present—a resident of the  
 site busy in his profession and would like to be ex-

I see no chance for the defendant to get to the de-  
 until late this afternoon anyway, probably tomorrow

e witness may be excused until three o'clock and at  
 determine whether or not it will be necessary for  
 nger.

If they intend to call the physician here who treated  
 want to know it.

understand.

Doctor Smith is in the room here and he is the  
 ated the plaintiff.

ill he may remain in the court room.

And then he may testify to privileged communi-

no is that?

Mr. Kearney: Doctor Smith, he treated the plaintiff at the time  
 of his injuries.

The Court: Well, I do not understand that any man may testify  
 to privileged communications.

Mr. Kearney: No.

The Court: If they are not to be examined as experts solely, they  
 ought to be under the rule. If they are to be examined on  
 52 other subjects, then the defendant will have them in the  
 room at its own risk, and the same applies to the plaintiff if  
 any of your expert witnesses are to be examined on other subjects.

Mr. Kearney:

Q. Now, this map that you have prepared here, that is approxi-  
 mately correct?

A. Yes.

Q. Now, what does this represent here? (Indicating.)

A. This (indicating) represents the furnaces—these three long  
 ones.

Q. "A" represents a furnace. And what does this represent,  
 "B"?

A. That is a furnace.

Q. And "C"?

A. That is a furnace.

Q. And "Number 1" what does that represent?

A. Number 1 furnace.

Q. And "Number 2"?

A. Number 2 and Number 3.

Q. "Number 3" furnace?

A. Yes.

Q. And what is this running through here? (indicating)

A. That is the track.

The Court: By "this," you mean the double line running through,  
 so that the reporter can get it.

Mr. Kearney:

Q. And the words, "Roaster, Roaster Building."

A. Yes.

Q. It is marked inside with an "X." Now, what is prepared in  
 this place here, the Roaster?

A. Calcine, roaster ore.

Q. Where is that calcine taken after it is roasted?

A. It is taken around on the railroad to the furnace.

Q. Around the railroad to the furnace.

The Court: The railroad is indicated by the double line.

A. Yes.

The Court: Well, try and describe it because "this" and these"  
 do not mean anything to the Reporter, you know, and the record  
 should show it.

Mr. Kearney:

Q. What is the distance from the roasters to the furnace?

The Court: Around by the way of the track.

Mr. Kearney:

Q. Around by the way of the track.

A. Oh, it must be a thousand feet, probably more.

Q. Now, what is the size of those cars?

A. I don't know. I don't know the size of them. The capacity is about eighteen tons, I should judge. At least, that is what I understood.

Q. Haul eighteen ton of hot calcine?

A. Calcine.

Q. And then where is this calcine emptied from those cars?

A. Emptied into those little dots down through here. There is two there, (indicating) this fettling system.

The Court: They are marked how?

Mr. Curley: They are little dots.

Mr. Kearney: Each one marked with four little dots.

53 The Witness: There is another line of hoppers there also.

Mr. Kearney:

Q. Now, you spoke about certain hoppers. Where are those hoppers.

A. These, (indicating) the fettling hoppers.

Q. Yes. What is that out there? (indicating)

A. These four dots are the fettling hoppers, the ones that I was repairing or getting in shape for them.

Q. Are they underneath the track?

A. They are underneath, underneath the track.

Q. How high is this track elevated from the ground?

A. About eighteen feet.

Q. Then the furnaces are below the track?

A. The furnaces are below the track; yes sir.

Q. And these hoppers, how do they run?

A. The hoppers run continuously from the end of the furnaces here down to almost to the end, about up like that (indicating) about that line. And there is a small cross-track, cross-track here (indicating) that feeds them with smaller cars. They shove them around by hand so. They just run around on an I-beam, on a kind of a walk for a man to walk on, and he can dump it any place there—just a partition between them. They run continuous right through on both sides.

Q. How far underneath here are these hoppers, under the track? How far below the track, the surface of the track, this railroad track?

Q. This is the rail and a quarter of an inch sheet iron plate (indicating).

Q. How long are the hoppers?

A. The hoppers is about thirty-seven inches or thirty-eight inches long in between the standard-gauge track, but after they get through

there I don't just exactly know the dimensions of them. They run continuously through there (indicating) with just partitions in between them. I don't know what the space is there. There is quite a few of them.

Q. What hopper were you working on when you were injured?

A. I was working on this here one here (indicating).

Mr. Curley: Which one, how are you going to designate that.

A. On the track that goes back to the west. There is two bins where they generally run back and get limestone.

Q. That is marked "C."

A. This furnace (indicating) was a dead furnace. It wasn't in operation; and this one (indicating) was dead; it wasn't in operation. This one (indicating) was in operation and we were getting this one (indicating) ready.

Q. You mean "B" and "C"?

Mr. Kearney: "A," "B," and "C."

Mr. Curley: "B" and "C" were not in operation?

A. Yes.

Q. Then you were working on "C."

A. Yes.

Mr. Kearney:

Q. What were you doing there at the time?

A. Putting an angle iron around under the platform on the little hopper so when the calcine was dumped down in so it wouldn't splash over and get on the roof of the furnace,—to make it dust-proof.

Mr. McFarland: If your Honor please, I think the diagram has been explained. If the witness has concluded his explanation. I don't think it is proper for him to stand in front of the jury, if they understand the diagram.

The Court: I can hear better if the witness were sitting back here, but if they haven't finished with the diagram—

Juror Rider: Your Honor, may I ask the witness a question?

The Court: Yes.

Juror Rider: I don't understand and I don't think the jury understands the positions of the hoppers between the furnace and the tracks. I would like to get that in the description.

The Court: Now, I want to say to you gentlemen that any of you may ask any question at any time during the progress of the trial.

Mr. Kearney:

Q. You stated this was the railroad track, didn't you, running from the roaster down to the point "C"?

A. It is a double track, this track is.

Q. Standard-gauged track?

A. Standard-gauged railroad track.

Q. Now, right under this track are the hoppers, just underneath,

about thirty inches down below here, and those hoppers then run right down into the furnace underneath the track, is that right?

A. No.

Q. Well, get it right then.

A. These hoppers are right under the platform, and the rails is set on big I-beams to support them up from below, and then there is on the feed-floor, there is a space cut out here from these hoppers so a man can get down into it. It is thirteen inches by nineteen inches, the opening. These hoppers are riveted in on these I-beams. It is supposed to be continuous, but as they couldn't make them continuous, they are just made to fit in these two I-beams, on these tracks here, and the other ones on the inside run down, continuously down on both sides. So I was down in there cutting the angle irons to fit in around.

Mr. McFarland: Now, if the Court please——

Mr. Kearney:

Q. Now, the hoppers, as I understand, are just underneath, below the tracks?

A. Below the tracks.

Q. The railroad tracks pass over the hoppers, this line of railroad coming through here, and it passes right over the hoppers. Now, from these cars that contain the calcine, how does the calcine dump out of those cars into these hoppers?

A. Why, he steps over here and pulls the lever and allows as much to go down as he likes, and then shuts it off.

Q. Is there any opening in the bottom of this car to let the calcine out?

A. Yes, sir.

Q. That is worked by a lever, is it?

A. Yes, sir; that is worked by a lever.

55 Mr. Kearney: Do you understand?

Juror Rider: I still don't understand the shape of these hoppers?

A. The hoppers is shaped about like that (indicating) shaped round like that (indicating), put up in here and riveted in on these big I-beams, with little angle bars, riveted on the hoppers; you see, the rivet goes through this way (indicating) on them, and then the other rivet goes that way (indicating). They rivet through the I-beams to support them up, hold them up.

Q. How deep are they?

A. Well, when I stand up in them they are just about that high (indicating), oh, I should judge thirty some inches, thirty-two, three or four inches; something like that.

Q. That is, all of the hoppers?

A. There are two on each side, you see, under each track. When this car come in it brings it over here and gets back on this switch (indicating), and comes in on the other side and fills up the other.

Q. These are on top of the furnaces, between the tracks, these hoppers?

A. There is a pipe underneath them that they can work with a little lever, you understand. As they need the material a man down below can stand——

Q. That isn't what I mean. The hopper rests on top of the furnace in between the tracks?

A. Yes.

Q. And underneath the track then and on top of the furnace?

A. Yes.

Q. Is it straight in between the two?

A. Yes, just the same as if the furnace was on this level, (indicating), and the platform is here, (indicating) and that is covered over, and the furnace—we will say, that (indicating) would be the line, you see right there, (indicating) for the furnace. The tracks come across this way and the hopper is down there (indicating) and these continuous hoppers run from here (indicating) and the platform is here (indicating). But a wall runs down here by the furnace, you understand, and there is a little narrow track here, about sixteen or eighteen inches wide—I think it is sixteen—and there is half a dozen or so of them there, that run along the furnaces, and this man comes along with the silica or limestone, or whatever he has got, and he crosses with it onto the little track, and he can feed this hopper in that track with the silica, and he puts the calcine in the ones under this track. There is no platform over the other end of it. The platform is just where the——

Juror Moore: Do I understand the hopper is movable or permanent?

A. Yes, it is permanent.

Q. It is nothing more or less that a receptacle to receive the stuff that is dumped out of these cars?

A. Yes.

Q. And it takes it into your furnace. It doesn't move; it stays there.

A. It doesn't move. It is riveted right into the I-beams.

Mr. Kearney:

Q. What is this car moved by?

A. Electricity.

Q. Is steam used in the smelter?

A. Yes, they have steam, yes.

Q. For propelling machinery?

A. Not that I know of, only one pump, boiler pump.

56 Q. Do you know how many ton- of copper they make there a day?

Mr. McFarland: If the Court please, I object to that.

The Court: I couldn't hear that question.

Mr. McFarland: How many tons of copper they make a day at the smelter.

The Court: Objection sustained.



Mr. Kearney:

Q. When you were working at that smelter under whom were you working?

A. I was working under Mr. Fraser and Mr. Neilson.

Q. Did I understand you, Nielson and Fraser?

A. Fraser and Nielson.

Q. When you were working for them at the time you were injured on December 28th, 1914, what kind of work were you doing?

A. I was repairing a hopper, putting my angle bars in to make them dust-proof.

Q. Who requested you to do that?

A. Both Mr. Neilson and Mr. Fraser. Mr. Fraser put me to work on the job.

Q. What kind of work were you doing, you say; you were doing what?

A. Fitting these angle bars in there so that these bins would be dust-proof.

Q. Did they give you any directions; that is, Mr. Fraser or Mr. Nielson, about how to do this work?

A. No sir; they told me that is what they wanted done and for me to go on and do it and get my material wherever I could.

Q. And doing that kind of work, how many years' experience had you had?

A. Seven years and a half.

Q. Do you understand that work well?

A. Yes sir.

Q. And they simply told you to do it and did not tell you how to do it—told you what they wanted done?

A. Just told me what they wanted done and for me to go ahead and do it and use my own judgment.

Q. And on the 28th day of December, 1914, you were doing that kind of work, were you?

A. Yes, sir.

Q. Well, now, I want you to tell the jury what you were doing there at that time and what happened to you?

A. I was——

Q. What time of day was it, first?

A. Oh, it was sometime after one o'clock, or it might have been close to two o'clock; I can't just remember.

Q. Go ahead.

A. I was in this hopper—everything was all completed but this one angle bar, this one thirty-seven inches long, going into it. And on the ends of this cross-ways the other two was on, and also the one on the opposite side. Well, I had to get down in this bin and cross my feet in this shape (illustrating) and on account of being so large I had to work myself down in here and get my head back in order to measure them so as to get them in proper place, because one side of the angle bar on account of its width, the width of the other one would have to be cut off so that there would be nothing to stick out

57 over, so that they would fit tight up against the I-beam, fit tight in the corner. There are rivets in there where the hopper is riveted onto the platform, and I had to mark off and cut out the holes for the rivets. I had plenty of room because the bin does not go up to an inch of the floor. When we got the angle bar in shape I bolted it in and then riveted it over the nuts and it made a pretty good job and strengthened the floor plates up. Well, I was in that position and this fellow drove in with the car. My helper hollered to me, he says, "He is coming." I says, "Just stay there a minute," I says, "and I will slip you out this angle bar," and I handed it out to him, and he put it to one side. And I had to turn myself in there in order to get around to get my feet around so I could raise myself up. It is pretty hard to get out of a place like that. These openings had been cut out with a round-nosed tool, and what they call a "rooter," a flat, blunt instrument, and shoved through with an air-gun, and it leaves quite a lot of burs and slivers on it, and it caught into your clothes. You have to get your arms up like that, (indicating), to get in a position to get out. Well, I got myself twisted around to come out, and just as I got my head up, why, the front of his car was about four or five feet from me, and he was still coming along slow, and the only thing—the only opportunity I had to save myself was to duck down in this manner (illustrating), or shape, like that (illustrating), and just about the time I got down, why, this calcine began to pour over on top of my head and down my neck, and that is when I told—when that happened I told him to keep agoing, keep agoing. I said that several times, but I hadn't said it until the calcine was on top of me. There was no other way for me to escape and I called to them to get the car over me so that I could get out. So he run partly over me and he stopped on account of my hollering in agony with the pain, and the helper had to tell him to go ahead and move the car off of me. He stopped for awhile and then he moved the car off just enough so I could possibly get out, and I just got my head out of there when Bentley run to my assistance and helped me up out of the hopper. The flesh and the skin on my arms hanging down like that (indicating), on both arms, and my clothes all on fire.

Mr. McFarland: Mr. Hammer, just a moment. I would rather Mr. Bentley would testify as to what he said and not Mr. Hammer. I object to what anybody else said.

Mr. Curley: He is stating his condition. He is stating that the flesh was hanging off his arms.

Mr. McFarland: I do not object to that. I am objecting to what he said Bentley said and did.

The Court: What is that?

Mr. McFarland: I object to the witness testifying what anybody else said or did.

Mr. Kearney: He said that Bentley helped him to get out.

The Court: Was that at the time?

The Witness: I am just illustrating to them the man that come and give me assistance first.

58 The Court: Well, I couldn't hear what the witness said about Mr. Bentley.

Mr. Curley: He simply said that Mr. Bentley came and helped him out.

The Court: I understood counsel to object to the witness quoting Mr. Bentley. I did not hear this witness say anything that Mr. Bentley said.

Mr. Curley: I did not either.

Mr. McFarland: Well, the record will show.

The Court: Read that last statement of the witness.

(Answer read as follows: "He stopped for awhile and then he moved the car off just enough so I could possibly get out, and I just got my head up out of there when Bentley run to my assistance and helped me out of the hopper.")

The Court: The objection is overruled. Now, Mr. Hammer I will have to rule on all these objections as they are made, and although it is necessary for the jury to hear every word you say, it is also necessary that I hear; otherwise I won't be able to rule.

The Witness: Am I not speaking loud.

The Court: You are speaking loud enough, but if you will speak slowly and distinctly so all of us can catch what you say, it will be much easier for us to keep up with the testimony. Try and speak distinctly. Now you may proceed.

A. After I was released out of the hopper, why, they put me on a stretcher and started to take me to the hospital, carried me over this track about a thousand feet, about a hundred yards over there to the railroad track and got me on a hand-car that they have for that purpose, specially constructed, and I think there were four men went to the hospital along. It seemed to work quite well for a short ways. They had to keep pushing the car down grade, so finally we got to the foot of the grade in front of the A. C. new store and found out that one of the wheels would not turn—was sliding on the rail, and they didn't hardly have sufficient help enough to keep moving the car to the hospital. Finally they picked up a few men that was coming along the railroad track and give then some assistance. So I was taken into the hospital and was attended by the physician, wounds dressed up, and I was injected with some medicine—I don't know what it was—and eased up as much as possible. And I suffered everything, especially with my eyes, about four weeks, with the gas and the fumes and the sulphur from this calcine—almost ruined my eyes on account of keeping them open. The water just run out of them. Well, they treated my eyes, and these wounds was dressed every day, I believe, and I continued going to the hospital after I had left there. I left there January the 28th. I wanted to get home. My residence was just across the street, and I had my son and daughter help me over to the house, that I would have better care with my wife than I would at the hospital. At least, I thought I would. And I was led back and forth from the hospital after that for two weeks to have my wounds dressed, and then I was strong enough to be able to walk alone, and I continued up to July the 2nd, and

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the physicians had every possible show to do their work. There was no retractions. I stood everything, even let them tear my fingers, pull that finger (indicating) back and broke it all the way down here (indicating) in order to try to straighten it. They never gave me anything to try to relieve the pain, to ease the punishment and pain.

Mr. McFarland: Your Honor, I object to that testimony as to what the physicians did.

The Court: Objection overruled.

Mr. Kearney:

Q. When you were taken there did they put oil on you, or no?

The Court: I couldn't hear you.

Mr. Kearney: I asked if when he was taken there they put oil all over him. Never mind, we will waive that.

Q. Now, tell the jury how you were injured, how you were burned; what places were you burned. Tell the jury.

The Court: You may keep your seat, Mr. Hammer.

A. I am burned from my arms here (indicating) down both arms, all that flesh, all the skin off of that hand, and all—these were all burned right off. (indicating) That (indicating) is all new skin on there. And from here (indicating) down this leg to the top of that foot. And they had taken that shoe off of that foot, what was left of it. Just went up like that. (indicating) My clothes all on fire, burned over here (indicating) on this hip, right on the joint. The spot was that large (indicating). They took nippers and broke the crust off of that three or four days after I was in the hospital in order to get under it to clear it off. That is how badly I was burned. Burned on my head here, back of my neck and on my face here. (indicating) And spots on me here, (indicating)—just small spots. We never paid much attention to them.

Mr. Kearney:

Q. Now, what particular effect have those burns had upon you?

A. Why, it has got me about a nervous wreck. My stomach is very bad ever since. I have been on a diet, kept on a doctor's diet for several months there—have to be very careful what I eat and how much I eat and when I eat.

Q. How does that affect the strength of your limbs?

A. My limbs are weak.

Q. Take for instance, that left hand; what is the matter with that?

A. My left hand is crippled. I can't use the fingers of it, and I haven't any strength.

Q. Just come over here where the jury can see that and show the jury.

A. I can't move it around.

Q. Now, what effect has it had, the burns on your left hand? Can you use your left arm?

60 A. Why, I can get it back that far. (illustrating). And when I get it up any higher than that (illustrating) I have

a pain in here (indicating), right down through here (indicating), down through that shoulder, through here, (indicating). And where it burned so deep on the elbow I think it had some effect on the cords. I can't hardly get it back any further than that. (illustrating). The arm would be absolutely useless to me. I couldn't hold a hammer. I wouldn't have no stroke with it as a boiler-maker, with the left hand.

Q. What effect has it had on the left leg?

A. It has got my knee practically crippled, there, (indicating) where it catches me, just like cutting the knee-cap there where it has burned into it.

Q. Has that left that weak?

A. It has left it weak. I have pains down here all the time where these lumpy cords are all knotted up in here. (indicating).

Q. Have you been able to do any manual work since the time you were injured on December 28th, 1914? Have you been able to do any work?

A. No, sir, I have not been able to do anything.

Q. Do you still have trouble with you- stomach

A. Yes, sir.

Mr. McFarland: Now, if the Court please, I object to that. There is no allegation that his stomach is disarranged or ruined. The particular grounds of plaintiff's injuries are set up in the complaint, specifically, but there is nothing so far as his stomach is concerned. I know the rule where negligence is charged—under that rule he can generally prove anything, but when the specific acts of injury are set forth and the results of those acts, he is confined to those specific acts and results.

The Court: I don't recall any allegation that the plaintiff has suffered from any stomach trouble as a result of his injuries.

Mr. Kearney: No, it is a general allegation here. We can prove that certainly under a general allegation. We haven't got to prove the injury was to the body, to specify—that is never permissible; but if we specify a particular injury then probably we cannot prove any other. But we say on account of the injuries that he has been physically disabled and crippled, and then under the general allegation we can prove that condition and any of these ailments that did incapacitate him, whatever they may be. Now we say at the last that he was strong, healthy, able-bodied—never had any sickness, was intelligent and industrious. Here on page 4, paragraph 4, page 5. As a proximate result of said burns the left hand and arm of plaintiff is weakened and crippled and the left hand is rendered useless, on account of said injuries—injuries of fire—burns—is permanently injured and crippled. I am going to show that his stomach trouble results from the burns.

The Court: Well, that would be a matter of expert testimony, would it not?

Mr. Kearney: I am going to ask him if he had this stomach trouble before that time and follow it up and lay the foundation for the introduction of testimony on the part of the experts.

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Mr. Elliott: If you Honor please, in the complaint there

are set forth the particular burns, and then beginning on line 5, page 4, it says, "that as a proximate result of said burns the left hand and the arm of plaintiff was weakened and crippled." The particular injuries that they allege are that the left hand is rendered useless, the fingers and thumb of the left hand drawn out of shape, and the right hip injured, and the left leg injured. We certainly received no intimation that he had stomach trouble from this allegation. We would have a right to come into court and compel them to amend it and make it more definite and certain. We certainly cannot be called upon at this late date to meet a contention of which we have received no intimation, wherein the complaint enumerated the particular injuries for which he seeks recovery.

The Court: I will permit the plaintiff to testify, it to be a fact, that the sulphur fumes sickened him, but as to any injury which he now suffers, any stomach trouble, I think that is not claimed in the complaint and to that I sustain the objection.

The Witness: Why, your Honor, I have been treated for this stomach trouble by their own physician and another one.

The Court: I understand, Mr. Hammer.

Mr. McFarland: If the Court please, I understand the objection is sustained to that?

The Court: The complaint does not allege that the plaintiff's stomach has been injured in any way, and I am only ruling on the law of the case.

Mr. McFarland: Now, I move that all that part of the witness's testimony in respect to his trouble with his stomach be stricken from the record.

The Court: At the present time.

Mr. McFarland: Yes.

The Court: I will strike that portion of his testimony out, but that portion in which it is said that the sulphur fumes and some made him sick is not stricken out, and is for the jury to consider together with the other evidence in the case

Mr. Kearney:

Q. What other injuries did you suffer as a result of the burns?

A. Why general weakness—not physically able the way I was before the accident. I have never regained my weight or my strength.

Q. How long were you in the hospital?

A. Just a month.

Q. During that time what kind of diet did they put you on?

A. Why—

Mr. McFarland: If the Court please, there is no complaint about the diet in this complaint. He is not suing or not basing  
62 his cause of action for the failure of feeding him on a particular diet, and as a result of that he is injured. I object to that.

Mr. Kearney: It is a foundation for something else.

Mr. Curley: If your Honor, please, will you let me say a word on this question of his stomach. The purpose of this testimony is not to show that it was from any burns on his stomach, but that the



injury to his stomach is one of the proximate results from the burns upon his hand and upon his leg, and the like.

Now the allegation here is, "and that the said hot calcine greatly burned the plaintiff on his head, about the neck, his left arm from the shoulder down was greatly burned, and the right hip and left leg all the way from the groin to the top of the foot were burned, and a burn on his right hip, and that said sulphur fumes sickened and stifled the plaintiff; that as a direct result of said burns the left hand and arm of plaintiff is weakened and crippled, and the left hand rendered useless, which has and will continue, to disable plaintiff from following his vocation as boiler-maker, steel foundry business and skilled workman, and that his fingers and thumb on his left hand are drawn out of shape and are useless in the performance of manual labor, and that his right hip is greatly injured and his left leg is injured, and that on account of said injuries the plaintiff has been and is greatly disfigured, scarred, crippled, and permanently injured."

Now he has been crippled and permanently injured. One reason that he has been permanently injured is the result of those injuries to his stomach. That has placed his stomach in such a condition. That is one of the results, one of the things that has made the injury a permanent injury, that there is a condition there—not from a direct burn, but as a consequence of the injuries to his hands and to his legs.

Now that is one of the causes of a permanent injury growing out of the injury to his hands and to his legs, just as much so, if your Honor please——

The Court: I don't care to hear any argument—any further argument. If you desire to amend your complaint by adding that, I will permit you to do so.

Mr. Curley: If you—Honor takes that view I will ask permission at this time to amend the complaint. But that is the idea, that there was no burning of the stomach, but that it was a proximate result.

The Court: I understand, but you can only recover in a personal injury case for the actual injuries sustained and alleged in the complaint. Whether you attempt to specify few or many, you are confined to those specified, as I understand the rule.

Mr. Curley: I don't know whether I made myself clear  
63 or not.

The Court: Yes, you make it perfectly clear that these are the indirect, or direct results of the injury.

Mr. Curley: That those are the results of the injuries that we allege that he did receive. For instance, the injury to his arm and the injury to his leg, the burn on his head and face. There was no burn on the stomach, but the direct result of that—just as much so as the drawing up of his fingers. The permanency of the injury to his stomach is as much a direct result of that as the drawing up of the fingers of his hand.

The Court: I cannot agree with you, but I will permit you to amend.

Mr. McFarland: We will object to the amendment, if your Honor



please. We are not advised and we are not summoned to appear here to answer an injury resulting to his stomach from the injuries described in the complaint.

The Court: Objection overruled.

Mr. McFarland: To which we except.

The Court: You may consider the amendment as filed as of this time.

Mr. Elliott: We would like to see the wording of it.

Mr. Curley: It is now twenty minutes of twelve, and we can prepare it during the noon hour.

The Court: You may reserve that part of the examination of the witness.

Mr. Kearney:

Q. At the time you were in the hospital about a month there, state whether or not you suffered from pain?

A. Yes, I was under great pain. They kept injecting—I don't know what they call it,—with a needle in there to relieve the pain. The doctor, he would do that—

The Court: Never mind what the doctor did.

Mr. Kearney: Cut that out, what the doctor did, or what the doctor said, or anything you said to the doctor. You must not testify to that.

Q. Now, after you got out of the hospital did you continue to suffer pain?

A. Yes, I suffered pain continuously. I suffer pain now.

Q. Not free from pain yet?

A. No.

Q. What particular pains do you have now?

A. My leg, my arm, my hip, my stomach.

Mr. McFarland: I move to strike out the stomach.

The Court: The latter part may be stricken out.

Mr. Kearney:

Q. Now, before the time of the injury, before December 28th, 1914, had you ever had any sickness?

A. No sir. Only small minor ailments.

64 Q. What was your physical condition on December 28th, 1914, just prior to your injury?

A. Good.

Q. What was your weight?

A. 225 pounds, working weight.

Q. And before that had you had any sickness?

A. No.

Q. Always been well?

A. Always been well.

Q. Vigorous and healthy?

A. Vigorous and healthy.

Mr. McFarland: Now, if the Court please, in asking these ques-

counsel should not lead the witness. I have indulged  
to this time, but I think he should let the witness  
if.

There is nothing before the court.

I object to counsel leading his witness.

Very well, at the proper time when the question is  
will rule on it.

I object to the last question.

Well, it is too late now. An objection to a leading  
made before it is answered.

They:

How many years old are you?

His coming December.

Have any other injuries that you did not mention?

I have got them all, on my leg, and my head and  
on top of my head and on my hip.

Your memory, you mentioned your arm?

Where here, my arm.

We object to any testimony on the question of  
shoulder, for the reason that there is no allegation  
that he received an injury on his shoulder, abso-  
might just as well undertake to prove that he lost

What is a part of his arm, isn't it?

No, I don't think so. There wouldn't be two  
of his arm and shoulder were the same thing.

It is drawing a pretty fine line between a man's  
arm.

Do you mean a burn on the shoulder?

No, a burn in here (indicating).

What isn't the shoulder.

In here, (indicating) the cord runs up into the

Understand, but was there any actual burn on the

Witness: No.

Well, then refer to it as the arm.

If your Honor please, it is quarter to twelve, now,  
could save time if we were to be permitted for the  
which we can prepare that amendment, because  
deal of the testimony we want to put in that we are  
concerning his stomach. We would only lose  
and I feel that probably we will save time in the

Very well, Gentlemen of the jury, you will not dis-  
cuss yourselves, or permit anyone else to discuss it  
or hearing. You will not form or express any  
merits of the case until it has been finally sub-  
Report at half-past one o'clock.

WED., Nov. 24th, 1915—1:30 p. m.

The Court: You may proceed.

Mr. Curley: If your Honor please, I have during the noon hour  
had page 4 of the complaint, the one that was interlined, re-written  
and I would ask leave to insert that in the original complaint.

The Court: Is that the one in which the interlineation was made?

Mr. Curley: Yes, I just had the young lady re-write the page.  
If your Honor will turn to page 5, I will indicate the amendment  
that I desire to make at this time. I have had that page re-written  
also. Now beginning at the top of page 5, "skilled workman, and  
that his fingers and thumb on his left hand were drawn out of  
shape \* \* \* greatly and permanently reduced."

The Court: That goes farther, far beyond what you asked leave  
to insert.

Mr. Curley: I know, I was looking it over and the only part that  
goes beyond was the last portion there. I do not want to run up  
against that question, and while I think it is sufficiently pleaded, I  
thought that probably a general plea of that kind would be better,  
and I will ask permission to make that amendment.

The Court: What say you to the amendment?

Mr. Elliott: If the Court please, there is still a further addition  
that appears on page 4, six lines from the bottom of the page, "and  
that said sulphur fumes sickened and stifled the plaintiff." We  
have that addition.

Mr. Curley: Isn't that in on page 4?

Mr. Elliott: I believe not in the original.

66 Mr. Curley: It would be unless she made a mistake in  
copying it.

The Court: It is in the original complaint.

Mr. Elliott: I beg your pardon. It does appear there.

Mr. Curley: I think there is no change in page 4 at all.

Mr. Elliott: The amendment allowed by the Court, I believe, was  
to enable the plaintiff to bring in proof as to the injury to the  
stomach, resulting injury, and so on.

The Court: The question is are you prepared to proceed with  
the trial on the amendment. If not, I will give you a continuance.

Mr. Kearney: We do not want to insist on an amendment here  
if it is going to force us into a continuance.

The Court: Well, Mr. Curley, I have been so generous in grant-  
ing plaintiff leave to amend his complaint again and again and  
have required the defendant to go to trial in the absence of material  
witnesses—put him upon the showing, and now—

Mr. Curley: Of course, we have admitted what that witness would  
testify.

The Court: I know, but that isn't like having the witness present,  
and I feel that if you desire to press the amendment to the extent  
that you have written it there, it would not be right to require the  
defendant to proceed with the trial.

Mr. Elliott: If your Honor please, we do not wish to proceed on  
that amendment.

Mr. Curley: Then I want to eliminate the objectionable feature, because we do not want a continuance.

Mr. McFarland: We are not prepared to meet that feature.

Mr. Curley: I had permission to amend about the stomach. Now the only additional feature there is that the plaintiff's ability to earn a living has been greatly and permanently reduced. I will eliminate that, if there is any question.

Mr. Kearney: It is practically in the complaint anyway.

Mr. Curley: It is practically in the complaint anyway, but I don't want to go beyond what the court thinks is right.

The Court: Now, let me see that amendment.

Mr. Curley: I think that the complaint takes care of it, but I might say I am not insisting on that last clause. I think the complaint is amply sufficient.

Mr. Elliott: Our objection is not alone to that, but as to the last clause.

67 Mr. Curley: I had permission to amend as to that.

Mr. Elliott: As to the stomach, as far as that is concerned, you did.

Mr. Curley: As far as the shoulder is concerned, if that is objectionable I will take that out. I don't care anything about that. If it is objectionable I will strike out everything but the stomach.

Mr. McFarland: We did not come here to defend against any trouble with the stomach.

The Court: How is that?

Mr. McFarland: We did not come here to defend on that. We did not know that they would amend and make that kind of a complaint, and we are not here prepared to defend as to it, or anything, except as stated in the original complaint.

The Court: That which is included within the brackets there will not be allowed, and I think I am going the limit in allowing you to make that amendment with reference to the stomach.

Mr. McFarland: That is the same as it was in the first place, with the exception of the allegation about the stomach, as I understand.

Mr. Curley: I don't know whether that makes good sense or not, "and that his stomach, and that his right hip is greatly injured."

The Court: Well, the stomach and the hip.

Mr. Curley: Yes, I guess that will make sense.

The Court: It is rather difficult by cutting out a part to make the sentence round out nicely, but it is the best that can be done. Come around, Mr. Hammer and take your seat.

JOSEPH B. HAMMER, the plaintiff herein, having been previously called and having testified in his own behalf, resumed the stand and further testified as follows:

Direct examination (continued).

By Mr. Kearney:

Q. Mr. Hammer, how hot was this calcine that poured in upon you?

A. Red hot.

Q. What is calcine composed of?

A. Different grades of ore. That is the way I understand it.

Q. How do they get calcine?

A. Out of the roasters.

Q. What is the process?

A. The process?

Q. Briefly yes?

A. Why, it is concentrated ores that are roasted in the roaster to a red-hot condition to burn the sulphur out of it.

Q. Well, is this ore or calcine that is brought in there, when it is dumped out does it contain sulphur fumes or not?

A. Yes, sir.

68 Q. A large quantity of them or not?

A. A large quantity.

Q. How does it come up when the calcine is emptied; does it comes up in a cloud?

A. It comes right up in a big cloud of smoke.

Q. Is it suffocating or not?

A. Suffocating, yes, sir.

Q. One working about that, has he got to wear any shield on his face?

Mr. McFarland: I object to it as a leading question.

The Court: Objection sustained.

Mr. McFarland: I insist now that the questions be asked in the regular way, and the witness not led.

Mr. Kearney:

Q. What protection, if any, do the workmen have to use as against the sulphur fumes?

A. They haven't any.

Q. They haven't any at all?

A. No, not furnished with any.

Q. Did you have any there at that time?

A. No.

Q. You spoke about an angle iron awhile ago. What is an angle-iron? What do you mean by that?

A. An angle iron is just the same as—you fit it in a square corner like that, (illustrating) three inches long on one side and three and one half on the other. It is a V-shape. It goes up into a corner and fits in. Part of it is along the side of the bin and the other part fits up against the floor.

Q. Are they supports?

A. They are supports when they are put into shape, yes, to hold the floor, plate of the floor down to keep the ore from going over in between the plate of the floor and the bin.

Q. How did you fasten those angle irons? How were they fastened to the hoppers?

A. They were bolted on and then riveted over the nut of the bolts.

Q. Bolted on from the inside of the hopper or not?

A. No, the nuts were put on the outside and riveted there.

Q. Do you make any holes inside of the hopper?

A. No, we cut the holes from the outside of the hopper.

Q. What were you doing there in the hopper?

A. Fitting an angle iron in the corners, cutting out the pieces, marking out the pieces so that they would fit in up agin the I-beam.

Q. Why is it necessary for you to go in the hopper?

A. It is necessary for me to go in the hopper to get the dimensions. There is rivets in there that you have to mark off to cut the holes out for the rivets, different places where the hopper is riveted onto the frame-work of the platform.

Q. Is that the customary way of doing that kind of work?

A. It is the only way you could do it.

Q. After your injury what was your weight? How much did you weigh after your injury? How much have you lost since?

A. Why, I don't remember what I exactly lost, but at present I am from seventeen to eighteen pounds lighter than I was. I weighed about 208 yesterday.

Q. What do you mean by I-beam?

A. An I-beam is a piece of iron shaped like a capital I. It comes across that way (illustrating) on both the bottom and the top, and the wood is in between.

Q. This work that you were doing there on the hopper, is that all the same as boiler-work?

A. Oh, yes.

69 Riveting?

A. Yes, sir; done as a class of boiler-work.

Mr. Kearney: I offer this sketch as Plaintiff's Exhibit 1.

Mr. McFarland: He hasn't proved it is correct.

Mr. Kearney: It is illustrating this witness's testimony, the one that he marked and explained to the jury here.

Mr. McFarland: It is illustrating if it is correct, and if the facts show it to be correct.

Mr. Kearney: I asked him if it is approximately correct.

Mr. McFarland: I have no objection, but I don't want the jury misled by an incorrect diagram.

The Court: Well, the witness may answer whether or not in his best judgment and recollection that is a correct diagram.

Mr. Kearney:

Q. What do you say in answer to the Court?

A. Yes, that is as good as I can make, unless I had a little more time. It explains it just exactly as it is there.

The Court: Any objection?

Mr. McFarland: Yes, I have, unless it is a correct reproduction of a situation attempted to be diagramed.

The Court: Objection overruled.

Mr. McFarland: Exception.

The Court: It may be received for the purpose of illustrating the testimony of the plaintiff.

(Paper marked by the Clerk, Plaintiff's Exhibit A.)

Mr. McFarland: If that is the purpose of it, I will withdraw my objection.

The Court: Very well.

Mr. Kearney:

Q. Now, you say you had some difficulties with your stomach. What *are* the nature of those difficulties, Mr. Hammer?

A. Why, a distressing pain across my stomach here, (indicating) more so when I am laying down to go to sleep, or retired at any other time—sickening, kind of like choking a man's wind off, like a cramp.

Q. When did this trouble first come on you?

A. The trouble first come on me that I noticed it severely about five weeks after the accident.

Q. During the five weeks after the accident that you were at the hospital, during that time did you eat?

A. No, I was on a diet, very light diet, nothing but broths and light food, very light food at that.

Q. And the same trouble is with you now?

A. Yes the stomach trouble is with me now.

Q. Before your injury did you have any stomach trouble?

70 A. No sir.

Q. Can you now eat all kinds of food, solid foods?

A. No sir.

Q. What is the effect when you do eat solid foods, meat?

A. Why, the effect is that it gives me a severe pain, and keeps me gulping up all the time—very much distressed.

Q. How are your nerves?

A. Oh, I am nervous.

Q. Do you rest well at nights now?

A. No, no sir. It always takes me about to two or three o'clock until I get to sleep. I have to lay this way (illustrating) in order to go to sleep. If I roll over on this hip, I wake up. If I get over the other way it is the same thing; my stomach bothers me.

Q. And the stomach trouble and the sleepless condition have only been with you since your injury?

Mr. McFarland: I object to the question.

The Court: Objection sustained. It is too leading.

Mr. Kearney:

Q. Did you have any of those difficulties before you were injured?

A. No.

Q. They have been with you since continuously?

A. Yes, almost continuously, yes.

Q. Mr. Hammer, if anyone wanted a boiler-maker or iron-worker, would they give you a job in the condition you are in now?

Mr. McFarland: I object to that question.

The Court: Read the question.

(Question read.)

The Court: The question whether they would give him a job would

not be the question, but whether he would do the work, would be able to do that class of work.

The Witness: No, I would not be able to do it.

Mr. Kearney:

Q. —.

A. I can't use my left hand. I have to have both hands to work at the boiler-making trade.

Mr. McFarland: I object to the argument succeeding the answer "no."

Mr. Curley: He is entitled to explain his answer.

The Court: I don't think that is argument. Objection overruled.

Mr. Kearney:

Q. Mr. Hammer, who is the person named there, "J. B. Hammer"? (Showing the paper to witness).

A. That is mine; that is myself.

Q. Whose signature is at the bottom of that?

A. A. R. Davis.

Q. What position does he hold?

A. Master mechanic of the construction work at the new smelter.

Q. You are the person named in that, as recommended?

A. Yes, I am the one.

71 Mr. Kearney: We ask to have it marked for identification "Plaintiff's Exhibit B".

Q. And the person here, "Joseph Hammer"? (Showing paper to witness).

A. That is me. That is Mr. Hardy, J. G. Hardy, master mechanic, operating department.

Q. Examine these two papers. (handing papers to witness)

A. Mr. Halter, boilermaker foreman, construction department. Mr. Halter also.

Q. Are you the person named in there?

A. Yes, I am the person, Mr. J. G. Hammer.

Mr. Kearney: I will ask to have these marked "Plaintiff's Exhibits, C. D. and E". That (indicating) is the one which has been offered in evidence.

Mr. McFarland: If your Honor please, may we be permitted to see them before they are introduced in evidence.

The Court: He does not offer those yet.

Mr. McFarland: I thought he was offering these papers.

The Court: They will be submitted to counsel for defendant before they are offered.

Mr. Elliott:

Q. Was this one from Halter here written in October, 1915, or 1913?

A. 1913.



Mr. McFarland: We have no objection to the certificates of competency and character and so on—those certificates.

The Court: They may be received.

Mr. Kearney: We offer them in evidence.

The Court: They may be received.

(Papers marked by the Clerk. Plaintiff's Exhibits B, C, D and E.)

(Counsel for plaintiff read Plaintiff's Exhibits B, C, D and E to the jury.)

Mr. McFarland: To save trouble, we admit that Mr. Hammer is a competent mechanic, and a capable one. That is all that these things could prove, and we admit that. We do not deny that. He sets them up in his complaint, and we don't deny it. It is admitted. Why take up the time of the Court to prove something we admit absolutely?

The Court: Well, in view of that admission, are there any further questions?

Mr. Kearney: Cross examine.

72 Cross-examination.

By Mr. McFarland:

Q. You say, Mr. Hammer, that you had been working at this particular work in which you were injured about seven and one-half days?

Mr. Curley: Years.

Mr. McFarland:

Q. Fixing angle irons on hoppers for—did I understand you to say that you had been working at that for how many years, twenty years?

A. No, no. I worked at the boiler-making about a continuous time of, putting it together, of seven and one-half years.

Q. You had been at this particular kind of work at which you were injured about seven and one-half years?

A. Yes, at the boiler trade.

Q. What?

A. At the boiler trade, yes.

Q. And this is a branch of what you call boiler-making?

A. Yes.

Q. Fixing these angle irons on hoppers?

A. Yes, that comes under the head of boiler-making.

Q. And is under the same business that boiler-making is?

A. Yes.

Q. Now, how many hoppers are there on that feed floor of the smelter?

A. Well, I don't know just how many there are.

Q. How many are there similar to the one that you were working on?

A. There is four of them small ones in between the two tracks, on

each furnace—four of them, if I remember distinctly, and I do, I believe, correctly. And then there is several larger ones on each furnace.

Q. How many hoppers are there on the feed-floor of similar size to the one that you were in at the time that you were injured, if you know?

A. There is four on a furnace, I believe.

Q. Four?

A. Yes, that is under the platform. I don't mean those that continue on to the end of the furnace, because I don't know how many partitions is in those, but they all belong to one group.

Q. Had you worked on any hopper similar to the one in which you were working at the time of the accident before.

A. Yes, I had been working out there for two weeks.

Q. What were you doing?

A. Making repairs on the floors and fixing the balance of these hoppers.

Q. Well, how many hoppers had you fixed prior to the one that you were fixing at the time that you were injured?

A. Well, I couldn't state just how many I had completed.

Q. As many as four?

A. This was the fourth one I was on on that furnace, yes. I had them all completed but putting this last piece of angle iron on.

Q. Then you had placed angle irons on three hoppers similar to the one that you were working in, before, before the one that you were then working in, the fourth?

A. Yes.

Q. Were the angle irons put on these three before in a similar way to the one in which you were putting angle irons on where you were injured?

A. Yes, sir.

Q. Exactly. And that was the purpose, of covering a space between the top of the hoppers—

A. And the floor.

73 Q. —and the bottom of the feed-floor?

A. Yes.

Q. So as to make the hoppers dus-proof?

A. Yes.

Q. Now, were you working on those other three hoppers, either one or the other, continuously, up to the time that you were working on the one in which you were injured?

A. No, not continuously, no. I was shifted to do other little jobs on the floor that was in a rush at times.

Q. But they were fixed, so to speak, within two weeks of the time of the one that you were fixing when you were injured.

A. Yes, we was up there—I should judge I was up there two weeks, or probably altogether—probably a few days more.

Q. And during that time, now, you were fixing these hoppers, these previous hoppers that you have testified to; is that true?

A. Yes, I was fixing those hoppers, yes.

Q. You went from one to the other until you got into the one in which you were injured.

A. I kept agoing from one into the other, only at times when I was taken off of that job to do some other special jobs. There was some special jobs that I completed up there.

Q. I know, but when you were not.

A. When I was not on the special jobs I repaired back on the original hopper job.

Q. Well, with the exception of the time that you were working at some special job, you were repairing these hoppers on the feed floor?

A. Yes.

Q. About how much time was taken in these other jobs that you did while you were up there to work on these hoppers?

A. Well, now, that is a hard matter to say just what time, because I haven't kept any track of the time. I was kept busy. I am sure of that.

Q. That time covered what? two weeks, just approximately, I am not asking you to be accurate, approximately two weeks?

A. Why, as I mentioned to you that I was on the floor possibly two weeks, or a few days over, on all the different jobs that I was doing.

Q. Then when you weren't doing these other jobs you were working on these hoppers; is that the idea?

A. Yes.

Q. Now approximately what time was devoted in that two weeks or more to odd jobs, and what part of that two weeks or more was devoted to the repair of these hoppers?

Mr. Kearney: I object to that as not cross-examination.

The Court: Objection overruled.

A. Well, now, I couldn't state exactly the length of time.

Mr. McFarland:

Q. I don't want you to, Mr. Hammer. Just approximately as your memory now serves you. I don't ask you to be accurate.

A. I figured it taken me a little over a day at one of these hoppers.

Q. Took you a little over a day?

A. Yes.

Q. That would give you the time then that you had devoted to the three hoppers, approximately three days, one day to each hopper.

A. Yes, I was four days or more on them. You see, I had them all finished but just putting the bolts on and cutting this last piece of angle iron for the last one.

74 Q. Now, did you put these angle irons on by the same method. Did you put these angle irons on the hoppers which you had previously repaired in the same manner and by the same method as you did on the hopper in which you were injured?

A. Yes, they were all put on in the same system, yes.

Q. Same method?

A. Yes.

Q. Now is there any——

A. All with the exceptions of the first one.

Q. The first one?

A. Yes.

Q. What was the method pursued in putting angle irons on the first one?

A. With the exception of the first one, I didn't put the time in on cutting corners in close enough, and Mr. Neilson found objections to it. It left a small space, probably one-eighth of an inch, or three-sixteenths to a half an inch from the corner being tightly closed up.

Q. That wouldn't change the method, the system that you used to put them on.

A. Well, they are all put on about the same way, only it takes longer to fit them in more accurate.

Q. That is a question of time, not a question of system or method. Do you know any other method you could have pursued to place these angle irons on that hopper than the one that you did pursue?

A. There is no other way of doing this work.

Q. Then I understand you it is impossible to put these angle irons on these hoppers as you did put them on by any other method than the one that you pursued?

A. Yes, providing you want to measure them and fit them in.

Q. Providing what?

A. Providing you want to measure them and fit them in close the way they wanted the work done.

Q. Well, that would be the only exception, would it, where they wanted to fit the angle irons in close so as to make the hoppers dust-proof? Otherwise another method could be pursued then if you didn't want to do that?

A. Well, you have to do the work the way these people order it done. It ain't the way you want to do it. It is the way they order the work done. If they want a tight job, it has got to be that way.

Q. I understood you to say that you had no directions as to any particular method to pursue in placing these irons on there by the company, or any of its agents or employees.

A. Not by the foreman. He told me to use my own judgment. He told me what he wanted and put the job up to me, the way they always do.

Q. Then it was up to you to place them any way you saw fit?

A. Place them up in a mechanical manner, yes.

Q. No other method or system would be placing them there in a mechanical manner?

A. I don't know how it could be done.

Q. Couldn't one stand on top of that feed-floor and place those angle irons on that hopper, without going into the hopper? I will get you to look at that diagram. (Showing map to witness.)

A. These are your openings here? (Indicating.)

Q. Yes, Now I call your attention to the portion of this diagram which is identified by the letter "A", supposed to represent one of the hoppers about which you have testified, just under the feed

floor of the smelter. Now, does that figure there which is designated by the letter "A", is that a correct——

75 A. That is the correct shape, yes.

Q. —designation of that?

A. Yes, that is the correct shape of it.

A. Of the hopper?

A. Yes, sir. Well, the hopper is wider than twenty-four inches.

Q. It is?

A. Yes, sir; it is twenty-six inches.

Q. Will you let me ask you the question and then you answer it please.

A. Yes.

Q. What is this (indicating) supposed to be, calling witness's attention to a projection from the hopper on the bottom of the same.

A. It is the feed-pipe that feeds the furnace through the roof.

Q. Then the furnace would be at the bottom of this pipe?

A. Yes.

Q. That is correct, is it?

A. Yes.

Q. Now, what would this indicate, this slanting mark, these slanting marks on either side of the top of the hopper?

A. That is the floor level.

Q. Now, you say that you were in this hopper, at the time you received this injury?

A. Yes, sir.

Q. How did you get into that hopper?

A. Through the opening.

Q. What is the depth of that hopper from the top of the feed-floor to the bottom of the hopper?

A. Thirty-two inches I think. I am pretty positive, yes.

Q. You aren't sure it isn't but twenty-four?

A. No, it is more than twenty-four.

Q. Now, in what position were you when the calcine car approached the hopper in which you were?

A. I showed you this morning. With my feet crossed like this (illustrating) and my head up above the floor, holding the angle iron with this hand (indicating) and marking it off with the other, in the corner.

Q. In what direction was your face from the car as it approached?

A. I was facing it.

Q. Facing the car as it approached?

A. Yes.

Q. And what distance were you from the car, would you say?

A. Well, I couldn't tell you the distance. I noticed the car when the helper first told me about the car coming.

Q. You saw the car coming then when he told you the car was coming?

A. Yes, I was turning myself around to get up and out.

Q. Well, how long were you getting out after you adjusted yourself, so that you could get out of that small hole?

A. I never got a chance to get out until after he run over me.

Q. But when did you first see the car? When did you first see the car when you were in a position that you could get out?

A. Oh, it was quite aways. I had to turn myself in there.

Q. I see. Before you could get out of the hopper?

A. Yes.

Q. And when you did adjust your body in such shape that you could, you did get out, didn't you, or not?

A. No, I didn't get out until after I was burned. The car was too close.

Q. When you got yourself in position so that you could get out, how far was the calcine car from you?

76 A. About five feet from the hole.

Q. At what gait was the car going?

A. Well, it would be impossible for me to tell you the speed. He wasn't going; he was coming.

Q. A couple of miles an hour?

A. Oh, I don't know.

Q. Slow was it, or fast?

A. It was medium slow, yes.

Q. Now, I want to call your attention to this. Do you recognize the line across the center of the diagram marked "fettling hopper" "F. H." hopper? What do you recognize those to represent?

A. They represent the fettling hoppers here.

Q. Fettling hoppers?

A. Yes.

Q. Well, now, were you in any one of these when you were injured?

A. I was in the last one up there, what they call the Number 3, and Number 3 furnace. Where is the Number 3 furnace?

Q. Well, what position was that hopper under the floor in reference to the points of the compass? Just state what it was, if it is north, south, east or west, or what.

A. This (indicating) is just the way—this is just the way the furnace sets there. Now this one here (indicating) is the one closer to the—you understand, we will take that for illustration. This middle one, this is a dead furnace, and this is the one up here (indicating) that I am working on, the third one up here, and the car comes in this way (indicating).

Q. What would be here? (indicating).

A. Well, you have only got two furnaces there. There is three of them.

Q. Yes here they are—one, two three. There is a hopper, here is one, here is one, here is one, here is one, and here is one—there are six hoppers.

Q. It stands just like that (illustrating). Now, unless you put the end of your furnace—now, you see, you have got your furnace here—there, this furnace here, this furnace here. This (indicating) is the standard gauge.

Q. There is the turn-table there, you see.

A. That turn-table ain't got anything to do with this standard-gauge track. That goes that way (indicating) crosswise.

Q. Now, Mr. Hammer, if you will pardon me, here are the stand-

ard-gauge tracks right here, and there are the little roads running across.

A. There, (indicating) is a calcine standard-gauge track right there. They come in like that. This (indicating) represents one furnace. Now, here we are (indicating). Now, this is the side we were working on, you remember. There are two other furnaces, you remember, two more sections like this here. I am working right in there (indicating).

Q. The furnace "on which I was working" is indicated by the numeral "1" in parenthesis. Now, had you fixed this one?

A. I had fixed these.

Q. There is 1, 2, 3, 4, and 5. You had fixed five?

A. No, I didn't say five. In fact I hadn't remembered that there were five.

Q. What do you say now?

A. Why I say there is six of them. There is one in between the two standard tracks, what I have worked on.

Q. You say that the furnaces that you had fixed previous to the one indicated by the numeral "1" in parenthesis are indicated by "2, 3, 4, 5, and 6". Is that correct.

A. Yes, I worked on them all. I think the last one I——

77 Q. Now, you had worked on five of those hoppers similar to the one that you were working on at the time that you were injured, before you were injured?

A. Yes.

Q. And you pursued the same method in your placing of those angle irons on the five previous ones that you did on the one that you were working on at the time you were injured?

A. Yes.

Q. Which was by getting down into the hopper?

A. Yes, and measured the angle iron. That is the only way.

Q. To measure and place the angle irons in on top of the hopper, is that right?

A. On the side of the hopper and under the floor.

Q. On the side of the hopper and under the floor. Now, couldn't you have stood upon the floor, say that was a bar of angle iron and you wanted to place it under the floor, couldn't you have drilled holes through the surface and then have put the angle iron under those holes and marked them and bored a hole to correspond with the hole above; could you do that?

A. The holes in the floor was cut first from the top?

Q. Yes, cut first. Now, you have three holes in the top of the floor.

A. Yes.

Q. Couldn't you have taken that angle iron and slipped it under that floor and marked the places through the holes on the surface of the floor and taken the angle iron out and drilled holes through that?

A. No.

Q. You couldn't do that?



se I had to fit these and corners in here. Now I am  
gle—there is an angle iron in here (indicating) and  
nderneath the hopper—has to be shoved back there  
probably if it was a little open, bent on the I-beam  
the hopper, it has to be shoved in that much far-  
is what made it necessary to get under there to get  
isions so we could saw this off.

don't be done by placing that angle iron under the  
surface?

measure it.

was it from the surface, from the surface here to  
ed that angle iron back under there to this surface,  
ce to this?

out nine inches, I should judge, on one side.

stand up on top of the floor and reach nine inches

after I had the angle iron fit so I could slip it in  
ne, I could do it.

you do that with the angle iron in the corner?

don't reach nine inches?

can't fit the angle in. You can't fit an angle iron  
work the way the work had to be done and do it  
cause we tried to do it that way. I laid down on  
I tried it and you can't see. You are in the dark  
have to have somebody to light you. It is a pretty

ave a light in there when you were fixing these?

light, yes. We were burning matches.

light you had to see by was from matches?

an extension light at times, yes.

trying to get you to explain to the jury is why it  
ou could not bore those holes through the plate  
o of the feed-floor and then slip those angle irons  
d mark through the floor onto the angle iron so as  
e riveted on to the feed-floor or the hopper.

easy to explain that.

n it to the jury.

he holes has been cut through the floor first, and  
ur angle iron back as far as the holes it has to be  
distance measured and marked off and sawed out  
p it behind this—this cross one here is about three  
from going right—butting right in,—in order to  
f of that angle iron to slip past that so that you can  
so it would be a tight job. This is the last angle  
t this job. There is no trouble keeping the angle  
the holes off in the angle iron. If the angle iron  
cut and the dimensions you want, you can slip  
ith your hand. One man can't do it.

iron was simply bent at one end, wasn't it, and  
er?

A. Not bent at all, it is straight.

Q. Fitted straight?

A. It is just the same here as if you cut this piece out. (illus-  
trating).

Q. One side would go one way and the other the other?

A. Say I had an angle iron—is coming over here, coming up  
under the floor so. (illustrating) You have to cut a part of this  
one (indicating) that comes the other way out so that it will jamb  
up agin these three inches or three and one-half, whatever the  
other angle iron might be.

Q. That couldn't be done from the surface?

A. No, sir.

Q. Impossible?

A. Impossible. It couldn't be done from the surface.

Q. What particular part of the work of placing this angle iron  
were you engaged at at the time the calcine car came up to you or  
onto you?

A. I was in there fitting it up in position and marking off the  
amount of it I wanted to cut out of each end.

Q. Now, I will ask you if you weren't in there engaged at that  
time in fitting these angle irons or placing them in such a situation  
that you could get the bolts through the surface of the floor and  
through the angle irons, so that you could screw them up and  
fasten them.

A. Why, that is easy done after the angle iron is fit you under-  
stand me. After the angle iron is fit all you have to do is just reach  
under the table and hold the angle iron in position, and you can  
stick on—

Q. I am asking you if the angle irons or angle iron wasn't fitted  
up for fastening to the hopper and the feed-floor before that car  
came up?

A. It wasn't fastened up in there, no.

Q. Weren't you fixing to fasten it by putting bolts through it?

A. No, I wasn't fixing to fasten it up by putting bolts through it.  
I was measuring it off, getting the dimensions for it.

Q. That is all right; you were measuring it—not attempting to  
fasten the angle iron on. That is the way I understand you.

A. Yes.

Mr. McFarland: If your Honor please, we will file this sketch of  
the situation there for identification.

79 The Court: It may be marked for identification.

(Paper marked by the Clerk, Defendant's Exhibit 1 for  
identification.)

Mr. McFarland:

Q. Now, Mr. Hammer, I understand you to say that you have  
been a boiler-maker and are familiar with the branches of that  
trade for twenty years.

A. No, I have worked at it almost thirty years ago, I said, yes.

Q. I will say then for thirty years.

A. But I haven't worked at it continuously. I do not admit I had.

Q. I am just asking you what the truth is about the matter. What do you say about it; how many years' experience have you had as a boiler-maker?

A. Seven and one-half years' experience as a boiler-maker.

Q. Now you have had seven and one-half years' experience in boiler-making, and during all that experience and observations never saw anyone place angle irons in that shape from the surface of the floor?

A. No, sir.

Q. Never did. You say it cannot be done?

A. Not in the position that I put that, it cannot be done. If they ain't fit close it can be done.

Q. Well, I would rather you answer the question, Mr. Hammer, whether or not it can or cannot be done. That is all the question I asked you.

A. It cannot be done in the manner that I was required to do it.

Q. Well, I am not asking you about that. I am asking you in the seven and one-half years' experience and observation in the trade of boiler-maker that you have never known that method to be pursued of placing angle irons on hoppers from the surface; is that true?

A. Not on hoppers of that style.

Q. You say it is a physical impossibility to do so.

A. Yes, and do the work the way it was required there at that place.

Q. It cannot be done where the work is required to be done as it was at that place?

A. Yes, sir.

Q. Now, in what respect is that work different from any other work in placing angle irons?

A. Why, it is that much different that this work had to be fit in there very tight and snug, and you had to get down in there to see what you was doing to measure. You couldn't do it in a haphazard way because they wouldn't accept the work.

Q. That isn't answering my question. That isn't answering it, whether your employers would accept the work or not. I am asking you whether it could be done.

A. No, I don't see how it could be done in any other way.

Q. Well, do you say now it can or cannot be done any other way?

A. It cannot be done.

Q. It cannot be done. That is the question and that is the answer that I want. You couldn't by standing or remaining on the surface of the feed-floor fit those angle irons in the position that you did fit them in any other way except by going down in the hopper?

A. I had to go in the hopper to do it; yes sir.

Q. And it couldn't be done any other way?

A. No, not that I know of.

80 Q. You tried it, however, didn't you?

A. Yes, I tried one of them and I was criticised on the work.

Q. When you started to try that didn't you consider that another method of doing that?

A. Why, I taken the best method to do that, the only method I could pursue whatever.

Q. Mr. Hammer, just answer the question. When you started to put those angle irons on from the surface did you consider that another method of performing that work.

A. Different style, yes.

Q. Then there are two methods by which that work can be done, aren't there?

A. Yes.

Q. If that is one that you considered and decided you couldn't do and the one that you afterwards adopted and did do, that constitutes two different methods.

A. There is only one method to do it and do it right. I told you I was criticized on the first job.

Q. There are two methods to do it wrongly? You say there aren't two methods of doing it rightly; are there two methods of doing it wrongly?

Mr. Kearney: I object to the question.

(Question read.)

The Court: I will overrule the objection, but I really do not believe that the witness understands.

Mr. McFarland: Well, I have been trying to get him to understand it, if your Honor please. I want to get the facts.

The Court: Do you understand what the last question means?

The Witness: I understand. Now, Judge, I am answering them just as honestly as I possibly can.

The Court: I understand.

The Witness: Now, when I say that I couldn't do that work the way it was required of me to do it, in any other way, I mean it couldn't be done any other way. I don't know of any other way of doing.

The Court: I understand. Read the question and see if you can answer the question. If you can, answer it; and if you cannot, say you cannot.

(Question read.)

A. Why, I don't believe I will answer that question, Judge.

The Court:

Q. Do you know how to answer it?

A. No, I wouldn't hardly understand the way to answer it. I don't see how there would be two ways of doing a thing wrong any more than there would be two ways of doing a thing right. But when there is only one possible way of doing anything, that is the only way you have to do it.

Mr. McFarland:

Q. Didn't you state in your examination in chief that the com-

pany directed you to go and place those angle irons there,  
S1 without any direction as to how to do it, and in what manner to do it?

A. No, they told me what they wanted, and I was told to use my own judgment by Mr. Neilson.

Q. And you did use your own judgment?

A. Yes, because I was always considered that I knowed more about boiler-making work than they—than he did, because he didn't understand boiler-making, the boiler-making trade as well as he does some other branches.

Q. So you used your own judgment in the way you did it and in the manner you did it?

A. Yes, I used my own judgment and the work seemed to be satisfactory.

Q. Did they say anything to you about not accepting the job if it wasn't satisfactory? You said you knew they wouldn't accept the job unless it was satisfactory. Did they say that?

A. I had stated to you that Mr. Nielson criticized me on the first hopper I fixed. Now, remember, I was in a peculiar position there. I was working under Mr. Fraser and also Mr. Nielson, and when Mr. Fraser would come up and ask me how I was getting along with the work, I would always give him an answer, give the answer, "very well," or something happened just as the case might be, and Mr. Nielson would come along and he would say "what did the old man say to you?" I would tell *me*. "Oh," he says, "nobody pays any attention to him around here." "Do this," he says, "use your own judgment and do it," he says. "So it is dust-proof," he says, "that is all we want."

Q. And you did it?

A. "And hurry up about it." He always put that "hurry up about it" in.

Q. Didn't he also at the same time, or about that time, tell you not to get in these hoppers, that it was dangerous?

A. No, he never told me not to get in the hopper at all. That is ridiculous that a man should come out and say that he give orders like that.

Q. I don't care about arguing with you on the subject.

The Court: Just answer the question.

Mr. McFarland: I would like the Court to instruct the witness not to argue the case.

The Court: Yes, just answer the question, and if it is improper your counsel will object to it.

Mr. McFarland:

Q. And didn't he tell you to place these angle irons where you did place them by remaining on the feed-floor and not go down into the hopper?

A. No sir.

Q. He didn't say that?

A. Never give me any orders to that effect.

Q. Did Mr. Nielson go up on the feed-floor when you started to place these angle irons and show you anything about it?

A. Yes, he explained to me naturally, as he would, as being the foreman, what was required there.

Q. And also how you were to do it, what method you were to pursue?

A. He didn't care what method I pursued as long as I got them in there so that they would be perfectly tight, tight joints in the corners.

82 Q. That is all he said to you?

A. That is about all. He told me to get my material wherever I could get it, hunt up old scrap and get whatever I could get and do the best I could with it.

Q. Anybody present at that conversation?

A. Not that I know.

Q. Who were present at the time of this accident, so far as you know?

A. My helper and the man that operated the car.

Q. Two.

A. And Mr. Bentley was away a short distance from there. I don't know just how far.

Q. Was he on top of that feed-floor or under it?

A. He was standing on the air pipe on that same level with the feed-floor.

Q. Now you understood perfectly well, didn't you, that if anything should occur to the car there while it was passing from one end of this feed-floor to the other, anything should happen to the lever, that the calcine would be released?

A. How is that?

Q. Didn't you know that if anything should occur to disturb the lever in the course of the car's crossing that feed floor that it would be liable to release the calcine and spill it on the track?

A. Why, certainly we knowed that if something disturbed the lever that it would spill.

Q. Now, would you think it a very safe method to pursue in fixing those angle irons to remain in a hopper while that calcine car was passing over you?

A. Why, the car wasn't in sight when I went in the hopper.

Q. Well, wouldn't that be, if that were true? I meant to say that is true. Wouldn't that be?

A. Put the question again please.

(Question read.)

A. Why, it wouldn't be very safe, no. I wouldn't consider it safe.

Q. It wouldn't be safe?

A. No, I wouldn't consider it safe to be in it.

Q. Now, while you were placing these angle irons on the hoppers previously fixed by you, did you remain in the hopper or did you get out of the hopper when this calcine car approached.

Mr. Kearney: I object to that as not cross-examination and he

has no right to introduce testimony of other occurrences at other places, or other similar acts.

The Court: Objection overruled.

(Question read.)

A. Why, I had always been given an opportunity to get out before, you see.

Mr. McFarland: That is all; you need not argue. Had your helper always——

The Court: Well, he can explain if he so desires, having answered your question. I think he is entitled to explain.

83 Mr. McFarland: Well, that is permissible, if your Honor please, but I object to his arguing questions with me.

The Court: If there is any explanation you desire to make——

The Witness: Why, yes.

The Court: After having answered the question you may do so. Always first answer the question and then if you desire to make an explanation you will be permitted to do so.

The Witness: The same operator wasn't always on that same shift. The other operator that was on would always come down and tell us, "Now, come on" he says, "get out of there because I am going down such-and-such a place"—give us plenty of time. We had plenty of time and we always escaped, but we were always in the dread with this other man while he was on duty.

The Court: You see, that is going further——

The Witness: Well, I don't mean to take any advantage.

The Court: I know that.

Mr. McFarland: He may make any explanation that he pleases in conformity with your Honor's ruling.

The Court: Well, when I stop him I think he is going too far.

(Answer read.)

A. We always had been able to get out.

Mr. McFarland:

Q. Well, now, did you have any notice from anyone to get out at the car approached?

A. Why I had my helper there watching.

Q. He invariably notified you that the car was approaching when it was approaching?

A. Yes.

Q. And you got out from that place, from the hopper, out of the hopper?

A. To a place of safety.

Q. Yes, because you did not consider the hopper a safe place when the car was going along, did you?

The Court: He has already answered that.

Mr. McFarland:

Q. Now, at this particular time were you notified to get out and requested to get out when the car was approaching at the particular time that you were injured?



A. Why, he hollered down that he was coming down there, and he was in motion when he hollered, and I had the angle iron up, as I told you, marking it off and measuring it, and passed it out to my helper, and after I had passed the angle iron out I turned myself around to get up, so that I could get out, and when I got in a position where I could use my feet to get out, why, the car was within five feet of me.

Q. Now, Mr. Hammer, as a matter of fact, didn't you decline to get out of that hopper when your helper told you that the car was coming up near the hopper—decline to come out and said that you had been annoyed by that car passing over you so much since you had been repairing these hoppers, and you had lost so much time in getting in and out that you weren't going to get out any more, and you stuck your hand out above the hopper and motioned to him, and told the helper to tell the motorman to come on, and that you held your hand out of the hopper in view of the motorman, perfect view of the motorman, and motioned this way (illustrating) for him to come on, and you still remained in the hopper?

A. No, nothing like that at all.

Q. Nothing at all.

A. I never told him to go on until the frame of the car was pushing the calcine on my head, and I told him to go on.

Q. Didn't you tell him while the car was standing still twenty-five feet from the hopper that you were then in——

A. The car——

Q. I haven't finished the question—that you were not going to get out any more, that you had been annoyed by having to get out, had lost so much time by getting out of the hopper when this calcine car passed along that you would not get out any more?

A. No, I haven't told you anything like that.

Q. And didn't you tell the helper at that time when the car was standing still twenty-five feet away to tell the motorman to come on?

A. No, sir; I did not.

Q. And that after you told the helper that you put your own hand outside of the hopper in full view of the motorman, and motioned this way (illustrating), come on, while you were in the hopper?

A. No, I hadn't done that that I know of; no sir; and I was perfectly conscious.

Q. You are quite positive that none of those things occurred that I have asked you in this last question? You say you had different helpers while you were engaged in placing those angle irons.

A. What is that, Mr.——

Q. Did you say you had different helpers during the time that you were placing those angle irons on the hoppers?

A. Well, I think I had the one helper mostly all the time.

Q. Well, do you remember the name of the one that assisted you?

A. Let's see, Mauro Provencio, or some such name as that.

Q. Do you know the name of the motorman?

A. I know his name is Provencio, but I don't know his first name.



Q. Do you know another Provencio; did you see another Provencio there at that time?

A. No, I didn't see another Provencio there.

Q. Well, you knew that if any obstruction on the track should strike that lever underneath the car, calcine car, that it would be likely to release the calcine, the hot calcine, would it not?

A. Why, probably it would.

Q. It probably would. You are familiar with that car, are you not, that was hauling the calcine?

A. I don't know just how the gate is put in that car.

Q. What?

A. I never worked on the car, not on the gate.

Q. But you knew it contained calcine, hot calcine?

A. Yes, I——

Q. And you knew that calcine was released by a lever?

A. Yes, sir.

85 Q. The lever worked under the bottom of the car?

A. Worked on the side of the car.

Q. Well, it was released on the bottom, wasn't it?

A. Yes.

Q. Anything that would interfere with the lever would likely release the hot calcine on the track it was going over, wouldn't it?

A. Yes, very likely would release it according to whether it hit it right.

Q. Well, wasn't it for that reason that the foreman told you that it was dangerous to work on the inside of that hopper; for that reason put those angle irons on from the top?

A. The foreman hadn't told me it was dangerous.

Q. He didn't tell you?

A. No, sir.

Q. You knew it yourself without being told, didn't you?

A. Certainly, I realized it was dangerous.

Q. What did you say the prevailing wages in that camp up there, Morenci, Clifton, and Duncan were?

A. At the time of the strike, of the close-down there, the way I understand it, it was \$4.72 for eight hours.

Q. Well, you mean there is a strike up there now in Clifton?

A. Yes, what they call it. When the strike started I mean, when the close-down was.

Q. You said, as I understood you, that the average wage scale so far as your department was concerned, or your vocation was concerned, was now—was \$4.72½, wasn't it?

A. No, I said——

Q. \$4.72, four dollars and seventy-two cents?

A. Yes, and I said that I also——

Q. Now, is there anyone being paid \$4.72 wage scale up there now in your business?

A. At the time of the close-down yes.

Q. I mean now.

A. Now?

Q. Yes.

A. I don't know. I don't know whether they are paying anything. There ain't anyone working that I know-of.

Q. Well, I understood you to say that the wage scale now was \$4.72.

A. At the time that this strike took place first, when they closed down.

Q. You aren't in that strike, are you?

A. No sir.

Q. Are you allied with any association that is in that strike?

Mr. Curley: I object to the question.

The Court: What is the question?

Mr. McFarland: Allied with any association or union that is connected with that strike.

Mr. Curley: That is objected to as improper.

The Court: Objection sustained.

Mr. McFarland:

Q. Didn't you say in your examination this morning that the only thing to do when you were injured was to fasten an angle iron up to the under surface of the floor; that your work was done there except that one thing, just one iron placed up against the——

A. Yes, it finished that hopper.

Q. Just the one iron?

A. Just the one iron.

86 Q. Was that iron on the side or in the corner?

A. It was the side iron, lengthwise.

Q. Side. So up to that time you had finished the iron in the corners, angle irons in the corners? The other ones were fixed?

A. Around the three sides.

Q. There was only one bar to go up?

A. One more to be fitted in place.

Q. You were fitting that in at that time?

A. Yes, sir.

Q. And not attempting to fasten it to the surface?

A. No, I wasn't attempting to fasten it.

Q. Now, among other injuries, did you say you received at that time an injury to your hand, to your left hand?

A. What is that?

Q. Among other injuries that you say you received from that accident, was there an injury to your left hand?

A. Yes, sir.

Q. Can you use that hand now?

A. Yes, I can use the fingers and the thumb a little bit.

A. Can you use the other three fingers?

— No, I can just move them slightly. I can't hold a hammer in it, or any tool, or anything.

Q. You have the use of your thumb and your first finger?

A. Just slightly, like that (illustrating).

Q. Have you any difficulty in handling papers if they are in your hands?

A. No, not if I can get hold of them.

Q. Now, were you treated for that trouble of your hand? Were you treated by anyone for that trouble?

A. Yes.

Q. Who was it?

A. Doctor Elliott and Doctor Smith.

Q. At the hospital in Clifton?

A. Yes, sir.

Q. Well, now, after they had treated you as far as they did treat you—now, after they had treated you to the extent that you were treated, while you were in the hospital and after I will ask you if it wasn't possible by a further treatment to have practically reduced that lame hand to normal?

Mr. Curley: I object to the question. It is calling for an expert opinion.

The Court: Read the question.

(Question read.)

The Court: If he can answer it, he may. It does call for an opinion, but if this witness can answer it, he may do so. If you cannot answer it, say so.

The Witness: I can answer it if you will let me answer it the way that I want to answer it. Let me answer it out full the way the matters come up, and I will answer it.

Mr. McFarland: I have no objection to your telling the jury just the situation and the facts. I want to get at that point; that is all.

The Court: Just state.

A. Doctor Smith and Doctor Goodrich—

87 Mr. Kearney: You are not a physician and the question there is whether you are skilled enough to know whether that cured or not. They are asking for your personal skill or knowledge in treating such injuries as that, and whether you would know or not if it could be cured by treatment.

The Court: Read the question.

(Question read.)

The Court: Well, in view of the fact that it is not shown that this witness has any knowledge of medicine or surgery I will sustain the objection.

Mr. McFarland:

Q. I will ask you if it wasn't possible, and if it wasn't a fact, that within two or three months after this accident, for you to straighten these two fingers on your left hand out practically straight this was, (illustrating) and if you did not do it, or if it wasn't done in your presence?

A. Will I answer that?

The Court: Yes.

Mr. Curley: Just answer the question whether it was possible for you to straighten them out or not.

A. No.

Mr. McFarland:

Q. And since that time if you haven't manipulated these fingers to any extent at all and they have become as you hold them there now in your left hand.

A. I didn't quite understand that.

Mr. McFarland: Read the question.

(Question read.)

A. They are the same now as when the treatment was stopped.

Mr. McFarland: I don't think that is an answer to the question if the Court please.

The Court: He asked you whether or not you had continued to manipulate those fingers.

A. Why sure as much as I could.

The Court: That is what he wants to know.

Mr. McFarland:

Q. Have you been treated at all for that hand, that left hand, since you left the hospital?

A. Have I what?

Q. Been treated by a physician?

A. By any physician?

Q. For the trouble in that hand, that left hand?

A. Been treating it by any physician?

Q. By any physician.

The Court: Since you left the hospital.

A. No, I haven't had no physician, no.

88 Mr. McFarland:

Q. You have never been treated for it since you left the hospital?

A. No.

Q. Didn't your physicians at that time tell you that with proper treatment that that hand could be restored to normal and that you refused to have that treatment performed on that hand for that purpose?

Mr. Curley: Just a moment, in order not to open up any way for that class of testimony, I object to it as being a privileged communication.

The Court: Well, this is calling for the witness's——

Mr. Curley: It calls for what the physician said to him, advised him about his hand.

The Court: Well, while you may not examine the physician without the plaintiff's consent, is there any rule which provides that he may not be required to answer that.

Mr. Curley: We might just as well examine the physician if he can be compelled to answer.

The Court: Not at all. Suppose he denies it. You cannot introduce the physician to refute his statement.

Mr. Curley: But suppose, your Honor, he is asked about some

question that he could not deny. I don't know what his answer would be to this, but suppose he was asked about some matter that is privileged between him and the physician, and he could not deny it. He would have to admit it. It would then cease to be privileged.

Mr. McFarland: If your Honor please, we will withdraw that particular question.

The Court: Very well.

Mr. McFarland:

Q. Now, about two months after this accident and your injury, and after you had been treated about that length of time, didn't your physician advise you that by a slight operation that hand could be restored practically to its normal condition?

Mr. Kearney: I object to that on the ground it is privileged.

Mr. McFarland:

Q. And so as to be a fairly useful hand?

The Court: Objection overruled.

Mr. Curley: We will take an exception.

The Court: Very well, he may answer.

(Question read.)

A. He advised me to have them fingers broke down with —  
89 or as useful as this one; and they told me they couldn't give me any positive assurance, but the best thing *would* do would be to break them down, and when they healed up, and if they remained stiff, so I could not use them, the best thing would be to amputate them afterwards. So I made up my mind I wouldn't have it done. I had no guarantee that the hand would be any better than it is now.

Mr. McFarland:

Q. Now, Mr. Hammer, you say you suffered from your stomach?

A. Yes, sir.

Q. How long after the injury did this trouble come onto you?

A. I think it was on the fifth week before I had the very severe spell.

Q. Are you satisfied in your own mind that that difficulty in your stomach was caused from the injury?

A. Yes, sir; by the advice of Doctor Elliott and also Doctor McPeters. They both told me the same thing.

Mr. McFarland: If your Honor please, I move to strike that out. I didn't ask him what Doctor McPeters said, or Doctor Elliott.

The Court: Objection sustained.

Mr. McFarland: I did not know what his answer was going to be. He got it out before I could object.

The Court: Well he said he is satisfied, yes, and then he proceeded to state what somebody else told him. Now his answer to your question may stand.

Mr. McFarland: My question was I think what he considered.

The Court: He has answered that he was satisfied, and then he began to give his reasons for it.

Mr. McFarland: I move to strike out all after satisfied.

The Court: It may be stricken out.

Mr. McFarland: Do you know of any other cause that would produce stomach trouble except burning on the arm and hand, and so on?

Mr. Curley: I object to that question, as calling for an expert opinion.

The Court: Objection overruled.

A. No, I don't see——

Mr. McFarland:

Q. Any other causes that you know that will produce stomach trouble besides burning on the hand, arm and leg?

A. I don't know any other cause that would cause it, no sir.

Q. You don't know of any other cause?

A. No, I am not familiar with any other cause.

Q. You think that is about the only cause that would produce stomach trouble, so far as you know?

90 A. Well, in my case.

Q. I mean generally.

A. I have no knowledge of what would cause it, no.

Q. Did you ever see anyone that had stomach trouble that had not been burned?

A. Yes, I have heard of them, yes.

Q. Well, then stomach trouble wouldn't necessarily come from a burn, would it?

Mr. Kearney: I object to the question. He is not an expert, or a physician on such things.

The Court: Well, I permitted him at your solicitation to answer with reference to this stomach trouble, and if he can answer it, he could answer that question.

(Question read.)

A. Well, I don't want to answer that question unless I am compelled to, Judge, with your permission.

The Court: Well, I think that is a matter of common knowledge anyway. Almost everybody knows that any person might have stomach trouble whether they are burned or not.

The Witness: Yes.

Mr. McFarland:

Q. Now, where did you get those angle irons that you were placing on that hopper that afternoon?

A. Where did I get them from?

Q. Yes.

A. Picked them up in the yard down in that boiler shop, in the scrap pile.

Q. Did your helper bring up any at that time?

both went down when we went after the angle irons, why did you bring and how many did he bring at that time? I don't know. We brought up the set.

between us. I will ask you this question: Didn't he give you the one that you brought up, and wasn't that the one that you were fitting that the calcine car came up? I don't know whether it was the one that he brought up or whether it was fitting in the one and passed it out to him. Do you recollect about it? I don't recollect, yes. I couldn't tell you which one he brought up.

I don't know whether it was the one he brought up or the one that you brought up that you were fitting in there at that time? I don't know, Judge.

I don't know whether it was the angle iron that your witness brought up or the one that you brought up that you were fitting in the one of the injury?

I don't know whether it was the piece I brought up, one that I brought up, or one of the ones that he brought up.

That is all I want to ask you. I think that is all, please.

examination.

Mr. Kearney:

this hopper on which you received the injury was in use; had they been using that to dump the calcine in the furnaces, or not?

It was a dead furnace. The hopper wasn't in use. Was the hopper next to it dead?

Was the hopper next to it? Was it in use?

the two hoppers beyond where you were the first set?

Wasn't using any of the hoppers on that furnace I was talking about?

How many are there?

Six of these little hoppers, Judge.

Are they in a row?

Yes, in a row, two sets.

They:

using that furnace then?

That furnace was a dead furnace. They were just getting a small wood fire in there heating it up.

Q. Then there was no occasion for them to dump calcine at all in that hopper that you were working on?

A. No sir.

Q. They were using the first furnace, the second furnace beyond you?

A. That was the first furnace that was in use. I was at the last one.

Q. You say that you motioned for the car to come on ahead, and it was about five feet from you. Why didn't you get out instead of motioning the car to come ahead?

A. I couldn't get out. I had no possible chance to get out.

Mr. McFarland: That same question was asked and answered this morning, why he couldn't get out.

The Court: I beg your pardon.

Mr. McFarland: It is simply for the purpose of saving time. He is going over the same ground.

The Court: Yes, I think he has answered that, but let the answer stand.

Mr. Kearney: That is all. Stand aside.

The Court:

Q. Do you know what caused the calcine to come through that car at that particular place at that time?

A. No sir; I couldn't tell you why it did, Judge.

The Court: That is all. Stand aside.

Juror Meyer: May I ask the witness a question?

The Court: Yes.

92 Q. Had a similar accident like that happened to your certain knowledge?

A. No, not similar to mine, no.

Q. Or had at any time any of that calcine been spilled that way that you know of?

A. Yes, the trestle that the car comes in on is all sheeted over.

Q. Well, I mean had it accidentally dumped out the way it did upon you that day?

A. It hadn't dumped on anybody, no, but it had spilled before.

Q. It had spilled?

A. Yes, because you could see traces of it all along the track.

(Witness excused.)

ELMER BENTLEY, called as a witness on behalf of the plaintiff herein, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Kearney:

Q. State your name?

A. Elmer Bentley.

A. Whereabouts do you live?



A. Clifton, Arizona.

Q. What is your vocation, Mr. Bentley?

A. My location?

Q. What is your vocation, what do you follow for a living?

A. Stationary engineering.

Q. How long have you followed that work?

A. About seven years.

Q. Have you had any experience as a boiler-maker?

A. No, sir.

Q. Do you know anything about that kind of work?

A. No, sir.

Q. Do you know the plaintiff, Mr. Hammer?

A. Yes, sir.

Q. Were you working for the Arizona Copper Company at its new smelter on December 28th, 1914?

A. Yes, sir.

Q. And did you see the plaintiff there at that time.

A. Yes, sir.

Q. I will ask you if you remember the time that Mr. Hammer was injured, that is, on the 28th day of December, 1914?

A. Yes, sir.

Q. At that time and just previous to the time he was injured, what, if anything, were you doing?

A. I was working as repairman there at the smelter.

Q. As repairman?

A. Yes, sir.

Q. Do you know what kind of work Mr. Hammer was doing at that time?

A. Mr. Hammer was working as repairman also.

Q. He was working as repairman?

A. Yes, sir.

Q. You were doing the same kind, the same character of work, were you?

A. Yes, sir.

Q. Then you do know how that kind of work ought to be done, don't you?

A. Well, I wouldn't call repair work boiler work, no.

Q. Well, then would you or would you not know how that kind of work should be done which Mr. Hammer was doing?

A. I would, yes sir,

Q. At the time he was injured how far were you away?

A. At the time Mr. Hammer was injured.

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Q. Yes sir.

A. I was about twenty-five or twenty-six feet away from him.

Q. And at that point were you at work?

A. No, sir, I was waiting there for orders from Mr. Nielson.

Q. I wish you would tell the jury in your own way now what you heard, and what you saw pertaining to the injury of Mr. Hammer.

Mr. McFarland: It depends upon who was speaking whether it would be material or not.

The Court: How is that?

Mr. McFarland: If it was someone speaking who had a right to or had authority behind him, it would be perfectly proper and right, but if it was somebody who was an outsider, or some fellow who happened to be there and had no business there, who was speaking for anybody, I would say it would be wholly immaterial, and I think the proper way would be an avowal of counsel that the conversation that he is seeking to produce here is one between certain parties who had authority to speak for the defendant. Now, he couldn't show what the plaintiff said, because the plaintiff can speak for himself.

Mr. Kearney: He may state if he heard cries of help from the plaintiff.

Mr. Curley: And what he did.

Mr. Kearney: And what he saw there.

Mr. McFarland: That would be perfectly proper, I should think, if he knew it was the plaintiff.

The Court: Well, the last question is the question that you desire the witness to answer is it? The last question is the question that you desire him to answer?

Mr. Kearney: That is what I expect him to answer.

The Court: Very well, he may answer. Tell what you saw and heard.

A. Well, I was standing up there and it was about 1:30 on this day, and Mr. Nielson asked me out there in front of the reverberatory to do some pipe work and Mr. Nielson was down on the ground, you understand, in front of the reverberatory, and I was up on top, and this calcine car come in over the tracks where Mr. Hammer was working, and I was sitting there facing the car, you see, and in a little while I heard Mr. Hammer holler. So I looked around in his direction, you see, and I called to Harry Nielson to come up on top of the reverberatory for him, and I run over to him. I saw this Mexican helper just motion the car ahead. That was to clear him so that he could come up out of the floor, and I run to him and helped him out.

Mr. Kearney:

Q. The car that spilled the calcine on him did you see that coming?

A. Yes sir.

Q. How far away from where he was working was it when you first noticed it coming?

94 A. How far was he away when I first noticed it coming?

Q. From the hopper where Mr. Hammer was working was the car when you first noticed it?

A. Well, I should judge it was two or three hundred feet away. It was coming in under the sheds there. It was coming in over the top of Number 1. I heard it coming in over the floor.

Q. Did that car at any time stop before it reached the hopper where Mr. Hammer was working?

A. It did not.

Q. Now, you went up there, I understand you to say, and helped Mr. Hammer out. Now what was his condition there?

A. Sir?

Q. What was his condition there?

A. Well, he was afire. His hat was afire and his clothing was afire all along this side, (indicating), and his shoes was afire, and he was part way above the hopper, I should judge, about here, (indicating) when I grabbed hold of him—had his head and shoulders up above the hole.

Q. Was he able to get out of there without help?

The Court: What is that?

Mr. Kearney: Was he able to get out of there without help.

Mr. McFarland: I object to that. I think that is improper. He cannot tell whether he was able or not.

Mr. Kearney: From his own personal knowledge.

The Court: He may tell what he did. His opinion as to whether or not he was able, I think is objectionable.

Mr. Kearney:

Q. Well, what would you say from what you saw or did whether,—in your opinion whether he was able to get out without assistance?

Mr. McFarland: I object to that. He hasn't qualified as an expert.

The Court: No, I say I sustain the objection to that question as calling for this witness's opinion as to whether he was able, but I will permit this witness to testify as to what he saw and what Mr. Hammer's condition was, and what he did toward helping him out.

Mr. Kearney:

Q. What was Mr. Hammer's condition there at that time?

A. Well his condition—condition was that he was overcome by the fumes and the gas and he was afire, and the flesh and skin was hanging down off his arms and hands when I got to him. That is his condition.

Q. State whether or not there was a large amount of sulphur smoke and fumes there?

A. Yes, sir.

Q. Did the car contain that with the calcine?

A. Yes, sir.

The Court: Mr. Kearney, I am not sure whether the jury hear all your questions or not. Now, you see, unless they hear your questions what this witness says is wholly unintelligible to them, and it is to me. I cannot hear what you say.

95 Mr. Kearney: What is the difficulty, hearing me or hearing the witness?

The Court: Well, I think both. For instance, when you put your hand to your mouth I cannot hear a thing. This room is difficult to hear in, no matter who is talking, but unless you—if you lower

your voice at all the jury cannot hear half you say, and it is very difficult for me to rule on objections when I do not hear the question.

Mr. Kearney:

Q. Mr. Bentley, I will ask you to speak a little louder?

A. Yes, sir.

Q. So that the jury can hear you. Now, you may state what was the condition of Mr. Hammer at the time you saw him there.

A. Mr. Hammer was on fire when I saw him there, and the flesh was hanging down off his arms and his hands, and he was a fire practically all over, and I tore the clothing off of him, shoes and all.

Q. Now, as to there being a large quantity there of sulphur fumes and gas, what do you say as to that?

Mr. McFarland: I object to the question. There is nothing to show that there was any there.

The Court: Well, he has already stated—

Mr. Curley: He has already stated there was.

The Court: —in answer to a similar question which I think the jury did not hear.

Mr. McFarland: Well, I object, if your Honor please, more from the point of repetition.

The Court: Well, I think in view of what I said to counsel that he is justified in asking this witness to repeat.

Mr. McFarland: It is the repetition that I object to, asking a question and repeating it three or four times in succession, as he has asked this witness to repeat the condition of Mr. Hammer when he first saw him.

The Court: He has stated that. Now he is asking him whether or not there was any sulphur fumes there, and in view of what I said to counsel in reference to speaking louder I think he is justified in repeating the question. You may answer, Mr. Witness.

A. Yes sir; the fumes from the calcine was strong.

Mr. Kearney:

Q. How much calcine had poured in and upon Mr. Hammer?

A. I couldn't say as to how much, but it was about a foot or so in the hopper.

Q. How hot was that calcine?

A. Dark red.

Q. Do you mean red from heat?

A. Yes, sir.

Q. Did it contain great heat then?

A. Yes, sir.

Q. What is its normal color without being heated?

A. Its normal color, why it is different colors, just black and gray when it comes from the roaster, when it is first taken from the roaster.

Q. It is ground-up rock, isn't it?

A. Sir?

Q. It is ground-up rock, isn't it?

A. Yes sir.

Q. Well, at that time did you notice any particular injuries to Mr. Hammer?

A. Not in particular, I was busy getting his clothes off and holding the man up, you see.

Q. State at that time what his condition was—Mr. Hammer's—how did he act?

A. Well, he acted very helpless at that time. He was helpless, you might say. I called for help to help hold him up.

Q. And who helped you?

A. Billy Morris.

Q. Was there a Mexican there?

A. There was.

Q. Did they assist you?

A. No sir.

Q. Do you know the man, the Mexican, that was helping him there?

A. I do.

Q. Do you know the one that was managing the motor car?

A. I don't know—by sight—I don't know his name.

Q. Did he offer you any assistance there?

A. No, sir.

Q. Then what did you do with Mr. Hammer after that?

A. I got him out of the hopper, pulled him out of the hole and taken him over to one side where it was cooler, away from the fumes and smoke and heat, and I sent Harry Neilson for a cup of water, and I sent his helper for the stretcher.

Q. What did you do with the stretcher?

A. When the stretcher came we laid him down and put him on it and carried him to the depot and took him to town.

Q. And where then?

A. To the hospital I suppose. I didn't go into town with him.

Q. Did you visit the hospital afterwards?

A. Yes, sir.

Q. You saw him there?

A. Yes, sir.

Q. Do you know what his condition was there at the hospital?

A. Well, he seemed to be suffering a great deal at times.

Q. At the time he was burned until he was in the hospital do you know whether he suffered much or not?

A. Yes sir; he did. The way he was carrying on I should judge he did. He must have in the condition he was in.

Q. Did you notice at the time any burns on his head or neck?

A. I did, yes sir.

Q. What particular burns did you notice?

A. I noticed the one here (indicating) on his head where the hole was in his hat, you see, and the one on his neck here (indicating).

Q. Did you notice other burns?

A. On his arms, and hands, yes, sir.

Q. His feet?

A. Yes sir, this leg (indicating) was burned the worst, I noticed, when I was taking the clothes off.

Q. What was his condition with reference to the burns?

A. Sir?

Q. What was his condition with reference to the burns?

A. Well, I could see they were serious.

Q. How badly was his leg burned?

A. The leg burned?

Q. Yes.

A. Bad enough to take the flesh and hide with it.

Q. Did you ever do any of that kind of work that Mr. Hammer was doing there at that time?

A. Have I ever done any of it?

Q. Did you ever do any of it?

A. Yes, sir.

Q. You knew about his putting angle irons in there then, didn't you?

A. I did, yes sir.

Q. Now, to mark those off and put them in there, could he do that without going down into the hopper?

97 Mr. McFarland: If the Court please, I object to that. That isn't the rule at all.

The Court: Read the question.

(Question read.)

Mr. Kearney:

Q. Angle irons?

A. No sir.

Q. In order to do a good job and put those angle irons in, it was necessary to go into the hopper?

A. Yes, sir.

Q. Had Mr. Hammer anything to do with managing that calcine car?

A. Did he have anything to do, you say, in managing the calcine car?

Q. Yes, bringing it up or down the track?

A. No sir.

Q. Was that in charge of another person?

A. Yes sir.

Q. Now, the hopper in which Mr. Hammer was working, was the company using that on that day to put hot calcines in?

A. No sir.

Q. Were they using the hopper next to it for that purpose?

A. No sir.

Q. How far away were those hoppers? I mean from the furnace, these particular hoppers that run from the furnace that they dump the hot calcine in to have it conveyed to the furnace, about how far were they apart?

A. Well, the laundry that the calcine is dropped into is all one

long hopper cut off into divisions, you see. It has got divisions in through it.

Q. Now, was there on that floor one of those hoppers, or one of those furnaces in use or not?

A. On this furnace, were they in use then?

Q. Yes.

A. No sir.

Q. Well, there are three furnaces down there at the smelter, around there on that floor, aren't there?

A. Yes sir. There was one of the reverberatories in use; yes sir.

Q. One of the reverberatories in use?

A. I understood you to say was the one on these hoppers in use.

Q. Now with reference to the roasters where the hot calcine comes from, was there—the one it came to first—was the first reverberatory or first hopper, was it in use or not?

A. You say did the car come to the first reverberatory or not?

Q. No, the one that is in use, was it the one that is closest to the roaster?

A. Yes sir.

Q. Well, then, the one that Mr. Hammer was working in was the one that is furthest from the roasters, then, was it?

Q. It was; yes sir.

Q. And before the car came to where Mr. Hammer was working it had to pass Number 1 reverberatory or furnace, didn't it?

A. Yes sir.

Q. And the hoppers attached to that were not in use, were they?

A. They weren't; no sir.

Q. So regardless of whether Mr. Hammer was in that hopper or not on that day, that hopper was not in use, nor used to receive any hot calcine?

A. No sir.

Q. Now, I wish you would describe to the jury—tell the jury what those hoppers are, how they are situated with reference to the feed-floor.

A. With reference to—what they are used for?

Q. Yes, how they are made, how they are situated with reference to that feed-floor.

A. Well, you see, they are in a laundry shape. They are three feet deep, and this hole that Mr. Hammer was down in was cut through plate boiler iron, and the hole is thirteen inches wide by nineteen inches long. The hoppers are made so that they have three fettling pipes. They come out of the bottom, you understand, and go down to the reverberatory. That is for fettling the furnace, and I believe there is three pipes to each hopper, three sixty-inch pipes to each hopper. And the laundry, as I said before, it used in fettling the furnace. They let this hot calcine down in the furnace. That is used for fettling the furnace. So that it won't cool the charge in the furnace, they put it in there as hot as they can get it.

Q. What size was that hole? That hopper that Mr. Hammer went into, what are the dimensions of that?



A. It is three feet wide by three feet deep, and the entrance where Joe went in is thirteen by nineteen.

Mr. McFarland: I did not understand that.

A. Thirteen by nineteen, the hole where he was in.

The Court:

Q. Do you mean by that that his feet were only nineteen inches below the surface of the track?

A. No sir, the hopper, you see, is three feet below the track.

Q. And then nineteen inches below that?

A. No, the hole where he went through, you see, was cut in this boiler plate. It was thirteen inches wide, the hole was, by nineteen inches long. That is just a little door, you see. That is in the center of the hopper. The hopper, I should judge, is three or four feet long; I wouldn't say positive. It is three or four.

Mr. Curley:

Q. By the "hole" you mean the opening by which he got into the hopper?

A. The opening, yes sir, the opening in which he went in is nineteen by thirteen.

Mr. Kearney: Cross examine.

Cross-examination.

By Mr. McFarland:

Q. You say your business is stationary engineer?

A. Yes sir.

Q. Were you engaged in that business at the date of the accident to Mr. Hammer? I didn't understand you, what you testified.

A. I did not understand the question.

Q. Were you engaged in that business—

A. No sir.

Q. —on the date that Mr. Hammer—that you said that Mr. Hammer was injured? You were not?

A. I was not, no sir.

Q. What were you doing?

A. I was working at the repair work.

Q. Now, where was the position that you occupied from the point where Mr. Hammer was injured?

A. I was standing at about forty-five degrees from where Mr. Hammer was.

Q. When he hollered?

A. Yes, sir.

Q. That is the first time you knew that anything was the matter with Mr. Hammer?

A. Yes sir.

Q. You hadn't observed anything in that direction before that?

A. Nothing more than the car coming in.

Q. You saw the car coming?

A. Yes sir.

Q. And you say that was on the track leading to the point where he got the calcine?

A. No, it was coming from the roaster down with the calcine.

Q. Was it inside of the shed or outside?

A. It was inside the shed.

Q. How far would that be, then, from the point where Mr. Hammer was in the hopper; about how far?

A. I don't understand how you mean. All three of these reverberatories—

Q. Well, when you first saw the car how far was it from the point where—from the hopper where Mr. Hammer alleges he was injured? Was it right over the hopper or was it some distance from it?

A. It was from the car from Mr. Hammer?

Q. Yes, the car.

The Court: When you first saw it.

A. It pulled off of him about two feet.

Mr. McFarland:

Q. It was about two feet then, the first time you saw it?

A. It pulled off of him, I say, of the hopper where he was about two feet.

Q. That is the first time you saw it?

A. Yes sir; I saw the Mexican boy motion the driver ahead so that he could get out.

Q. Was that the first time you saw the car?

A. No, sir; I saw the car coming in.

Q. When you first saw it then how far was this car from the hopper where Mr. Hammer was injured, when you first saw it?

A. It was I should say one hundred feet east.

Q. Did you watch that car come up to the hopper where Mr. Hammer was in?

A. I did.

Q. Kept your eye on it all the time?

A. Yes sir.

Q. You usually do that when cars are passing you?

A. Yes sir; I usually do on that floor out there, because it is a dangerous proposition to be around there when a car comes in there.

Q. You are quite positive that car never stopped until it passed over Mr. Hammer?

A. Yes sir.

Q. Had you been attracted to Mr. Hammer before you heard him holler?

A. Sir?

Q. Did he holler before the car passed over him?

A. Not to my knowledge; no sir.

Q. When was it, when the car was over him or after it had passed beyond him that you heard him holler?

A. After the car had passed, he was hollering when the car slowed down, you see.

Q. Slowed down?

A. Yes sir.

Q. After it had passed over the hopper in which Mr. Hammer was putting on these angle irons, how far had it passed that hopper before you heard him hollering?

A. Heard Mr.—

Q. Heard Mr. Hammer holler?

A. Why, I heard him hollering as soon as the car had stopped there.

Q. How far had it passed this hopper he was in when he hollered, you heard him holler?

A. It wasn't passed at all. He was hollering when the 100 car stopped.

Q. Well, the car was over the hopper, wasn't it?

A. Yes sir, he was hollering then, and I saw this Mexican boy motion the car ahead off of him.

Q. That is when the Mexican boy motioned?

A. The motorman drove the car on ahead.

Q. You saw no motion by anybody prior to that time?

A. Sir?

Q. You didn't see anybody motion to the motorman to come on prior to that time?

A. No sir.

Q. You are quite sure the car never stopped?

A. Yes sir; I am.

Q. Went right along over this hopper that he was in?

A. Yes sir.

Q. How far did it go before it stopped?

A. After the boy motioned on ahead it moved a couple of feet, I should judge.

Q. Then it would be a couple of feet past the hopper?

A. Yes sir.

Q. And you are quite sure now that you saw that car from the time it entered on the feed-floor of the smelter?

A. Yes sir.

Q. And it never stopped until it passed over the hopper in which Mr. Hammer was engaged in putting these angle irons?

A. I am.

Q. You are sure about that?

A. Yes sir; I am.

Q. Couldn't be mistaken about that?

A. Not very well, because I have been working up there myself a good many times myself, and I have got chased down off the floor with the fumes of it when they would charge the furnace.

Q. If Mr. Hammer were to say that the car stopped before it came to the hopper in which he was you would say he was mistaken, wouldn't you?

A. I would, when I was standing there watching it.

Q. You couldn't possibly be mistaken?

A. Well, I possibly could; yes sir.

Q. You could be?

A. Yes sir; I possibly could be mistaken but I am quite sure it didn't stop.

Q. But you are as well satisfied that you are correct on that proposition as you are on anything else that you have testified to?

A. Yes sir.

Q. Equally as confident on that subject?

A. Yes sir.

Mr. McFarland: That is all.

(Witness excused.)

Mr. Kearney: At this time I will introduce the table of the life expectancy.

Mr. McFarland: We are willing the Court should instruct the jury on the life expectancy.

Mr. Kearney: At his age, fifty years, the expectation of life is 20.9 years.

Mr. McFarland: Well, whatever that expectancy is, we are willing that the Court instruct the jury without any other proof.

101 The Court: Is that the American Mortality Table?

Mr. Kearney: This is the American, based on the American, yes.

The Court: Very well, if counsel makes no objection, I shall instruct the jury on that subject, at the proper time.

Mr. Kearney: Now, if the Court please, we have at this time a stipulation here that a certain witness, John Holtz, if he were sworn as a witness on this trial, he would testify as in this stipulation stated.

The Court: File your stipulation.

Mr. McFarland: We admit that he was a good, competent workman. I don't see how a man as good and as competent a workman as he could ever get in this situation.

The Court: Very well you may read it.

(Counsel read stipulation to the jury.)

The Court: Gentlemen, it is admitted by counsel on both sides as to a stipulation on file, by both counsel that if that witness were present he would give the testimony contained in this stipulation that has just been read to you.

MEADE CLYNE, M. D., called as a witness on behalf of the plaintiff herein, having been first duly sworn, was examined and testified as follows:

Direct-examination.

By Mr. Curley:

Q. State your name, Doctor?

A. Meade Clyne.

Q. What is your business or profession?

A. Physician and surgeon.

Mr. Curley: Will you concede the Doctor's qualifications to testify?

Mr. Elliott: Certainly.

Mr. Curley:

Q. Doctor Clyne, state whether or not you have made a physical examination of Mr. Hammer, the plaintiff in this case, within the last few days.

A. I have.

Q. When?

A. It was yesterday morning.

Q. State what you found upon that examination his physical condition to be.

A. I found a number of scars from burns on different parts of his body. I made some notes at the time of the location of the burns.

Q. You may refer to a memorandum which you have.

(Witness consults memorandum.)

A. The location of the scars, there were a number on his left leg, one on his right hip over his hip, and some on his left arm, and some weak scars on his right wrist, right forearm. There were also a scar—scars about his head, rather

102 Mr. Elliott: If your Honor please, you will remember the attorney put that question to him and we objected and the question was withdrawn.

Mr. Curley: That is my recollection of Mr. Hammer's testimony.

The Court: I don't think that Mr. Hammer said that he had been on broth diet for three months.

Mr. Curley: He said they kept him on broths.

The Court: I understood him to say five weeks myself, but I might be mistaken, and if there is any question about it I will permit you to ask a question of Mr. Hammer as to when he began to take solids into his stomach.

Mr. Kearney: We might call him to the stand again and ask him that question.

The Court: Very well, ask him where he is. Just keep your seat.

Mr. Curley: Mr. Hammer, during the time that you were in the hospital you testified this morning that you were upon a diet?

Mr. Hammer: Yes, sir.

Mr. Curley: Of what did that consist?

Mr. Hammer: That consisted of light foods, broths and soups and teas and a glass of milk.

Mr. Curley: Did you take any solid foods, any meat or anything of that nature, into your stomach during that time?

Mr. Hammer: Yes, very little, though, very light.

Mr. Curley: To what extent?

Mr. Hammer: Oh, on several occasions.

Mr. Curley: During the time that you were in the hospital?

Mr. Hammer: Yes.

The Court: For how many weeks?

Mr. Hammer: I was in the hospital just one month from December 28th, until January 28th, and the following Sunday after that is the Sunday that I thought I would take a little solid food, when

I had the very severe spell of the stomach trouble, from that on for several months after.

Mr. Curley: Of what did that solid food consist?

Mr. Hammer: Just a small piece of meat and a few potatoes.

103 Mr. Elliott: I wish to ask Mr. Hammer a question. While you were on that diet, Mr. Hammer, didn't you also have soft food such as eggs, and oatmeal?

Mr. Hammer: Yes, eggs several times, yes.

Mr. Elliott: How long did that continue?

Mr. Hammer: Why, that continued for quite awhile, and then when I had the bad spell, I was under treatment for the first spell by Doctor McPeters, and he warned me and told me that if I wasn't very careful——

Mr. Elliott: Objected to.

The Court: You need not tell what he told you. The question is did you eat eggs and oatmeal during that time?

Mr. Hammer: Yes.

The Court: Go ahead now and put your question.

(Question read as follows: Assuming Doctor, that Mr. Hammer was in a healthy condition, strong, robust, healthy condition, with no stomach trouble prior to the time of his burns, and assuming that he was put upon a diet from the time of his burns and kept upon a diet for three months after that;)

Mr. Curley:

Q. Assuming, Doctor, that Mr. Hammer was in the hospital for a month under treatment, and during that time his food consisted of, almost entirely of soups and broth, eggs, and oatmeal, with very little solids, and assuming that about a month after his injury he partook of some solid food, a small quantity of meat, and that he immediately began suffering from his stomach, and that he has continued to suffer from the condition that you found to exist on examination within the past few days, what, in your opinion, would you consider as the cause of that condition?

A. I think it would be fair to assume that the——

The Court: Speak out loudly, Doctor.

A. I beg your pardon, sir, I think it would be fair to assume that the condition was possibly due to the burns, and that is, the toxic condition of the burns.

Q. That would be your opinion?

A. Yes, sir.

Q. State whether or not, Doctor, it is common for stomach ulcers to follow a severe burn of the character undergone by Mr. Hammer at the time of his injury.

A. I think it is rather common.

Q. It is rather common?

A. Yes, sir.

A. State, Doctor, the effect of a stomach ulcer, such as it is your opinion Mr. Hammer is afflicted with, upon his stomach and upon his general physical condition.

A. The effect upon the general physical condition would be to limit his diet, and possibly subsequently, and as a result of the gastric ulcer there might possibly be some very serious condition result from that.

Q. What?

A. Well, about seventy-one per cent of ulcers result in cancer of the stomach.

104 Q. About seventy-one per cent of stomach ulcers result in cancer of the stomach?

A. Yes sir.

Q. What per cent of those cases, Doctor, result fatally?

A. I should think possibly about twenty-five per cent of gastric ulcers, if untreated surgically, in the condition that I assume Mr. Hammer's to be would be fatal.

Q. About twenty-five per cent?

A. Yes sir.

Q. And seventy-one per cent of those cases ultimately result in a cancerous condition of the stomach? You examined Mr. Hammer's left hand, doctor, the left arm?

A. Yes sir.

Q. In what manner is that—will that afflict him in the future for performing manual labor? For instance, in his occupation as a boiler-maker?

A. Well, I don't think he would be able to perform any, any hard manual labor with that hand.

Q. Do you regard that injury, Doctor, as a permanent injury?

A. I do.

Q. What benefit, if any, Doctor, would be derived from breaking those fingers down, in so far as regaining the use of the hand would be concerned?

A. I don't think that very much benefit could be derived now from that procedure.

Q. You don't think very much benefit? Why? Tell the jury why.

A. Why simply breaking the hands back, the scar tissue is still there, and they would retract again.

Q. Is it your opinion that if the fingers were broken down, if they remained straight, that they would still remain stiff?

A. Yes, I think they would.

Q. The injury, Doctor, to his left leg and knee, will that—is that in your opinion of a permanent nature?

A. I think so, yes sir.

Q. State to the jury just of what that consists, and just why you regard that permanent.

A. Why, the scars are there and will always be there, and it would be rather hard to benefit them any.

Q. Do those injuries, Doctor, subject Mr. Hammer, to diseases to a greater extent than he would have been subject prior to his injury?

A. The injuries on his leg, you mean?

Q. The burns.

A. Why, I think they would.



Q. Now, what is your reason for that?

A. Well, the general condition has been disturbed; that is, the general well condition.

Q. You regard his condition as it is now as a permanent condition?

A. Yes sir.

Mr. Curley: That is all Doctor.

The Court: You may cross examine this witness Friday morning. Gentlemen of the jury, you will not discuss this case among yourselves, or permit anyone else to discuss it in your presence or hearing. Do not form or express any opinion as to the merits of the case until it has been finally submitted to you, and you will not read any newspaper accounts of this case. I shall rely upon you implicitly not to violate these instructions. Should you do so, you might cause a retrial of this case, which, of course, is an expense to the litigants as well as to the government. I do not know that there will be any newspaper accounts of the trial in either of the papers, but if there be such I shall rely upon you not to read them. Keep your minds open and free, and get all the impressions of this case from the witnesses, that you get at all from the witnesses who are examined before you. We will adjourn until Friday morning at half-past nine.

FRIDAY, Nov. 26th, 1915—9:30 a. m.

The Court: You may proceed. Doctor Clyne, take the stand.

MEADE CLYNE, M. D., called as a witness on behalf of the plaintiff herein, having been previously sworn and testified, resumed the stand and further testified as follows:

Direct examination (continued).

By Mr. Curley:

Q. Just one question I want to ask you, Doctor. What, besides the external examination you made of Mr. Hammer with reference to his stomach troubles—what other examination did you make?

A. I examined the stomach contents.

Q. Well, now explain to the jury in what manner that was done.

A. Why, a test meal was give- Mr. Hammer, and it was removed and examined. It was left in a certain length of time, and an examination of the contents of the fluid removed was made.

Q. What, if anything, did that disclose?

A. That disclosed the—well, a trace of blood and the viscosity of the stomach contents.

Q. Doctor, what effect will the injuries upon Mr. Hammer's body have with reference to his response to cold and heat and being tender and susceptible to irritation?

A. Why, I think they would make his more susceptible to that sort of thing.

Q. Make heat and cold more noticeable to him?

A. Yes sir.

Mr. Curley: You may cross-examine.

Cross-examination.

By Mr. Elliott:

Q. Wednesday afternoon, Doctor, you testified to an examination of the plaintiff, Mr. Hammer, in this case, and stated that you observed there scars on the right hip and on the left leg near the knee.

A. Yes sir.

Q. And on the side of the face and the back of the neck, as I remember. Now Doctor, do you consider that the scar on the right hip will keep Hammer from working the balance of his life?

106 A. No sir, that alone.

Q. Will you say that the scar on his left leg near the knee is going to keep him from working the rest of this life?

A. That scar interferes with the motion of his knee.

Q. Well, that would incapacitate him from every form of gainful occupation that you know of, would it?

A. Possibly not every form.

Q. He would still be able to work some?

A. He would be able to do work in which he would not be required to do any walking, or anything of that sort.

Q. No, he is not an invalid that requires a wheeled chair on account of that, is he?

A. No.

Q. Do you consider that the burns on the side of the face and the back of the neck will incapacitate him from working the rest of his life?

A. No sir.

Q. Did you manipulate Hammer's hand to determine how much his fingers could be straightened on the left hand?

A. Yes sir.

Q. Will you demonstrate to the jury, using your hand as an illustration, what movement is possible in those fingers in Hammer's hand.

A. As I remember it, this finger (indicating) can be almost straightened, possible straightened.

The Court: That is the index finger on the left hand.

A. Yes, possibly not exactly straightened. This one, only about part-way, in this way.

The Court: Well, now, when you say "this one" Doctor Clyne, you know the Reporter is taking this down. You say "this one"—

A. The second finger.

The Court: Very well.

A. Just partially, and this one less than that. That is the third finger. And the little one, I think it would be absolutely impossible to straighten at all.

Mr. Elliott:

Q. But it is possible to open that left hand more than that (indicating).

Mr. Curley: I don't see how the Reporter is going to get that.

A. It would be impossible to open it that much.

Mr. Elliott:

Q. Well, it is possible then, to open the left hand further than having the second and third fingers pressed into the palm of that hand?

A. Yes, it is a little more flexible than that.

Q. Doctor, I will ask you to take Mr. Hammer and show the jury how far you can open the fingers on his hand.

A. This finger can be opened I think. That is the index finger—that way (illustrating). This one less; that is the third one; and this one not at all.

Q. That one not at all, of course?

A. These two.

Q. Now, Doctor, you have been looking at a hand that has had a year to contract. In a hand like this will the fingers contract more and more as time goes on if not prevented by treatment?

107 A. Yes sir, that is usually the tendency.

Q. If fingers such as these were once straightened and placed on a splint, early, before all of this contraction had taken place, wouldn't that form of treatment keep the fingers from drawing in so much?

A. It would keep them from drawing in so much, yes sir; as much as they are now.

Q. If the patient had willingly and readily submitted himself to such treatment?

Mr. Curley: We object to the form of the question.

The Court: I sustain the objection to the "willingly."

Mr. Elliott: I will withdraw those adjectives. If the patient had submitted himself to such treatment.

(Question read.)

A. Yes sir.

Q. Doctor, in looking at such a hand burned nearly a year ago, is not the first thing that occurs to you, whether or not some of this contraction could have been prevented in those fingers?

A. Yes sir.

Q. As that hand stands, as you have examined it, would you advise amputating all of the fingers and the thumb?

A. No sir.

Q. Why not?

A. Because some of those fingers, possibly one or two are useful to him.

Q. They are useful?

A. That is, in a way, yes, useful to him.

Q. Would it be well, in your opinion, to amputate the little finger?  
A. Yes, I think so. Possibly—yes, I think it would be.

Q. Would you consider that the amputation of a little finger on the hand is a very grave mutilation?

A. No sir, not under the circumstances.

Q. And in your opinion is such an operation attended by great pain or danger to the patient?

A. No sir.

Q. May it not be performed even under cocaine safely?

A. Yes sir.

Q. And is that not a common practice?

A. It is.

Q. In surgery?

A. It is.

Q. You stated Wednesday afternoon that you found a gastric ulcer, stomach ulcer in Mr. Hammer, and you also stated that it was fair to assume that that condition probably followed the burning. Now, you made this diagnosis on what Hammer told you about his stomach, and also on examination of the stool and the stomach contents; I believe you also stated that this morning.

A. Yes sir.

Q. Did you find any blood in the stool?

A. No sir.

Q. You found acidity in the stomach contents, however?

A. Yes sir.

Q. Is not acidity a common thing in individuals who have not ulcer?

A. It is.

Q. You also stated that you found blood, I believe, in the stomach contents.

A. Yes sir, I said a trace of blood.

Q. Now, how do you take these stomach contents from the body?

A. With a stomach tube, stomach pump, ordinarily called.

108 Q. Will you explain to the jury, please, how that stomach pump is used?

A. The stomach pump is passed through the mouth into the throat and down the œsophagus into the stomach.

Q. Into the stomach?

A. Yes sir.

Q. Now, Doctor, does it not very often happen, without any reflection intended whatever on the operating physician, or surgeon, that blood will come from the use of that stomach pump.

A. Sometimes.

Q. That does happen, does it not Doctor?

A. Yes, it does happen.

Q. Might it not have been possible that the blood that you found so became present?

A. There is a possibility of that.

Q. Did you give Hammer, Joe Hammer, here, a radiograph or an X-ray?

A. No, sir, I did not.

Q. You haven't seen that ulcer then, have you?

A. I haven't seen it.

Q. Doctor, has the theory that a stomach ulcer, gastric ulcer necessarily or does follow a burn, has that any logical explanation in your mind? In your own experience has that any logical explanation?

A. Except that it does follow, that is the only explanation that I can give you.

Q. Well has it any logical explanation in your mind?

A. Yes, there is a logical explanation.

Q. Well, now, isn't this more of an old text-book statement that has been handed down, and the logic left out, that ulcer is caused by burns?

A. It is an old text-book statement, I think.

Q. Don't you know that the more recent surgical and medical investigation has exploded the fact that a man ever gets an ulcer from a burn?

A. No sir.

Q. You don't know that?

A. No, I don't know that.

Q. Isn't that the later theory?

A. I know that such a theory has been advanced. I did not know it had been generally accepted.

Q. And the theory has grown out of the fact that a burn and an ulcer have existed as a coincidence.

A. Certainly they can exist as a coincidence.

Q. Could inhaling fumes give a man ulcer of the stomach?

A. Not—no, I don't think so, not ordinarily.

Q. You don't think so, do you?

A. Not ordinarily.

Q. Well, after all, are not stomach ulcers rather common things, anyway, and many people have them who have had no severe burn or burns at all, and who don't know that they have an ulcer?

A. Ulcer- are common—commonly occur, and do not follow burns. Possibly some people have ulcers, slight ones, that do not know that they have them, except that they are conscious of some dyspeptic condition, or indigestion, as they say.

Q. They could arise from a great variety of causes?

A. Yes, sir.

Q. Do you meant that, Doctor, your statement of last Wednesday, that one man out of every three, or seventy one per cent of persons who have ulcer of the stomach get cancer?

A. That is the accepted statement, accepted view.

Q. Rather do you not mean that of the people who have cancer of the stomach, seventy-one per cent of those people get that cancer from the ulcer of the stomach.

109 A. That also could follow.

Q. I did not understand your answer.

A. That could follow, I say.

Q. Well, they are not exactly the same statement-, are they?

A. No sir.

Q. That is, seventy-one per cent of all ulcers produce cancer is not the same as the statement that of people who have cancer, seventy-one per cent of those persons derive their cancer from an ulcer. Those aren't the same statements by any means.

A. No.

Q. Well, then, you mean of those persons who have ulcers seventy-one per cent of such persons derive—I mean of those persons who have cancer, seventy-one per cent of such persons derive their cancer from ulcer?

A. I did not make that statement.

Q. No, but isn't that what you mean, or do you mean to say that seventy-one per cent of ulcers cause cancer?

A. Yes, seventy-one per cent of all ulcers; that is, who have a definite history of ulcer, have been found to develop cancer in a number of clinics where they keep accurate data on the subject.

Q. If a man came to your hospital, Doctor, having a burn and a running fever, would you put him on a diet composed of pie and meat or would it be a matter of hospital routine to put him on a soft and liquid diet?

A. A soft diet would be the routine.

Q. A man having a severe burn naturally would have a running fever, would he not?

A. Yes, if he had infected burns.

Q. And having that fever, that would be the reason for putting him on a soft liquid diet?

A. Yes sir.

Q. And not keeping him on pie and meat. That was the left hand that was burned, was it not?

A. I did not hear that.

Q. That was the left hand that was burned, was it not?

A. Yes, sir.

Q. Now, Mr. Hammer here has stated that he has acted a good part of his life as a boiler-maker, and iron-worker foreman. In your opinion do you believe that his injuries would incapacitate him from acting as such foreman?

Mr. Curley: I object to the question. It does not say that the doctor knows what the duties of an iron-worker or boiler-maker foreman are.

The Court: Taking into consideration the fact that he answered your question along that line, I will overrule the objection. He may answer.

The Witness: Whether or not he can act as a foreman, is that the question?

The Court: Read the question.

(Question read.)

Mr. Curley: I object to that for the further reason that Mr. Hammer did not testify that a good part of his life had been spent in that way.

110 The Court: It would depend upon what you mean by a good part of it. I think it is rather indefinite, and for that

reason I sustain the objection. My recollection is that the witness said seven and one-half years as a boiler-maker.

Mr. Curley: Seven and one-half years as a boiler-maker?

The Court: That is what he said.

Mr. Curley: And at different times he acted for shorter periods as foreman in one way or another. But he did not state that he had so acted for a good part of his life.

The Court: I sustain the objection to the question for the reasons just stated.

Mr. Elliott:

Q. Doctor, Mr. Hammer has testified that in the past he has acted as a boiler-maker and iron-worker foreman. In your opinion would his present injuries incapacitate him from acting further as such foreman.

A. If the duties of a foreman require any demonstrating, I would say not. If a foreman just walks around and does not do any particular manual labor, I would say that he could.

Q. You have just made a diagnosis of ulcer from seeing Hammer once or twice here in the last few days, haven't you.

A. I saw him three times.

Q. You haven't followed his case except what he has told you for any length of time, have you?

A. No sir.

Q. Does not the fact that you found no blood in the bowel movement speak against such an active ulcer as you have spoken of?

A. Not necessarily.

Q. With an active ulcer of the stomach would you expect to find blood in the bowel movement?

A. I only examined one stool.

Q. You did not find any in that?

A. No.

Q. Now if this little finger had been removed early and Mr. Hammer had received treatment so that his fingers would not have drawn up, might it not have been possible to have given him a pretty fair working hand?

A. Yes.

Q. Or if he had permitted the removal of the little finger and the application of splints, probably under gas, you think under those circumstances he might have had a fairly useful hand?

A. Yes, he might have had a fairly useful hand.

Q. Now what does breaking down such a hand as this mean? Mr. Hammer stated here the other day, yesterday, that his physicians wished to break down his hand. Now what does that mean with such a hand as this? Does it mean breaking the bones?

A. Not necessarily, no; it does not mean breaking the bones. It means breaking up the adhesions that have formed in the joints, and possibly straightening the tendons in the hand.

Q. Now how is that done? What is that operation?

A. Ordinarily the patient is given some sort of an anæsthetic, and the fingers are forcibly straightened.



Q. On a splint?

A. It is put in a splint afterwards.

Q. I mean put up in a splint afterwards.

A. Yes.

111 Q. Would the application of gas be a sufficient anæsthetic in a case of that character?

A. Yes sir.

Q. Does it seem to you in your experience as a surgeon and physician like a reasonable surgical statement that any competent doctor would have advised Hammer to cut off the fingers and thumb on his hand?

A. No, I would not.

Q. In the beginning?

A. The fingers and thumb?

Q. Yes, leaving a stump?

A. No, I would not think so.

Q. Would you not regard it as a more reasonable surgical statement that the doctor advised him to have his fingers straightened under gas, and determine the extent to which they could be straightened, and then if nothing could be done for that little finger, to have removed it?

A. Yes sir.

Q. Do you know Doctor Smith, sitting here, at all?

A. No.

Q. Have you heard of him?

A. Yes sir.

Q. From your knowledge of Doctor Smith do you think he would advise Joe Hammer to cut off all the fingers on his hand?

Mr. Curley: I object to it as not proper cross-examination.

The Court: Objection sustained.

Mr. Elliott: That is all, Doctor.

Redirect examination.

By Mr. Curley:

Q. Doctor, by breaking down the fingers in the manner you have just stated, would you understand by that that after the fingers had been so broken down that he would have the use of his fingers?

A. No.

Mr. Curley: That is all.

Recross-examination.

By Mr. Elliott:

Q. But you say, Doctor, that if that had been done you believe he would have had a fairly useful hand? That is your answer to my question?

A. Fairly useful hand.

The Court:

Q. What use would they have been to him, those fingers?

A. Well, possibly a little bit straighter than they are now.

Q. Could the fingers have been worked and used any better?

A. They might have been used a little better than they are now, a little more than they are now, more flexible.

The Court: That is all.

Mr. Elliott:

Q. If that had been undertaken early, Doctor, within two or three months after the injury, when the burns had first healed, would they not have been a great deal better, before the scar had hardened and thickened?

A. It is rather impossible to say how much better they would be— they would have been, but I think they might be a little bit better under that treatment.

Q. But such treatment as that was treatment which he  
112 should have submitted to — have gotten the best possible result from his hand?

A. Yes sir.

(Witness excused.)

I. E. HUFFMAN, M. D., called as a witness on behalf of the plaintiff herein, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Curley:

Q. Your name, Doctor.

A. I. E. Huffman.

Q. You are a practicing physician here?

A. Yes.

Mr. Curley: I suppose you will concede that the Doctor is qualified to testify?

Mr. Elliott: Yes sir.

Mr. Curley: It is stipulated that the Doctor is qualified to testify as an expert in this case.

Q. Doctor, do you know the plaintiff, Mr. Joseph Hammer?

A. Yes, sir.

Q. Have you been called upon to make an examination or examinations of Mr. Hammer within the last few days?

A. I have.

Q. With reference to his burns and his general condition?

A. Yes sir.

Q. Well, from that examination what did you find?

Mr. McFarland: If your Honor please, we object to any examination of Doctor Huffman here on any facts in this case on the ground that he was present during Doctor Clyne's entire examination Wednesday afternoon and this morning. They may examine Doctor Huffman as much as they wish based on a hypothesis, but I

believe upon the facts in the case that he has learned by an active knowledge of the case, he should be disqualified to testify to.

The Court: My recollection is that I stated to counsel on both sides that the expert witnesses would not be put under the rule.

Mr. McFarland: I understood, your Honor, that that would apply to hypothetical examinations.

The Court: I do not recall limiting it that way.

Mr. McFarland: That was my understanding of it.

Mr. Curley: Your Honor stated if they wanted to testify to anything outside of the case, outside of that, that would apply.

The Court: Any statement made by the plaintiff or any  
113 facts in the case. Now if you are keeping any of your expert witnesses out of the room by reason of that impression, they may enter the room.

(Question read.)

A. I found a number of burns, of scars about the body. One I believe on the right hip, on the left leg there were a number of scars, and — the head and neck were a number of scars, and the left hand.

Mr. Curley:

Q. What *what* the condition of those scars on his left leg, Doctor.

A. Well, there was considerable scar tissue there, and they were still discolored, not contracted down, indicating that they had been burned rather severely.

Q. Did you make any examination of—well, did you find any other conditions, Doctor, in your examination?

A. I found a condition of the stomach that led me to believe that he had an ulcer, gastric ulcer.

Q. You found a condition that led you to believe?

A. Yes sir.

Q. From your examination of Mr. Hammer and the history of his case, did you form any opinion as to the cause of that condition?

A. I did.

A. What?

A. I believe that the ulcer was caused by the burns that he had received at the time that he was injured.

Q. As a consequence of his present physical condition, Doctor, what would you say as to the permanency or otherwise of his injuries?

The Court: All of them or certain ones?

Mr. Curley:

Q. Well, the permanency of the injury that he received; that is, upon his general condition?

Mr. Elliott: I think we will object to that question.

Mr. Curley: It is pretty hard to say just which scar or which—

Mr. Elliott: Specify the injuries in the question.

Mr. Curley: I will withdraw that question.

Q. What would you say as to whether or not Mr. Hammer has been permanently or otherwise injured from the nature of the burns that he has received?

A. I think his injuries are permanent.

Q. Are ulcers of the stomach always accompanied by a hemorrhage, Doctor?

A. No.

Q. Approximately what percent are?

A. Well, there is about—blood is found on examination of the stools and stomach contents in about fifty percent.

Q. About half?

A. Yes sir.

Q. Is that among the medical profession considered a serious condition, Doctor—abscess of the stomach?

A. Ulcer?

Q. Ulcer of the stomach?

A. It is.

Q. What are come of the consequences of such a condition?

A. Well, general impairment of health, and a cancer of the stomach often results from an ulcer.

114 Q. Do cancers follow to any great extent from any marked number of ulcers?

The Court: Read that question?

(Question read.)

Mr. Curley:

Q. From any marked number or any great number?

A. Yes, they do.

Mr. Curley: You may examine.

Cross-examination.

By Mr. Elliott:

Q. Are you of the opinion, Doctor, that that scar on Mr. Hammer's left leg is going to incapacitate him for the rest of his life from doing any work?

A. No.

Q. He walks around pretty briskly, does he not?

A. I did not catch that.

Q. I say he walks around fairly briskly, does he not?

A. Well, I think that after those scars on his legs are entirely contracted, that the scars will probably not cause any disability of the legs.

Q. The legs will be all right?

A. I think so in time.

The Court: How long a time will that require in your judgment?

A. That would be pretty hard to state, Judge. Possibly it may be a couple of years. That is only approximately. It would be hard to state.

Mr. Elliott: Doctor, if Mr. Hammer within a reasonable time after his injury, upon the healing of the burns, had submitted himself to a treatment whereby the adhesions would have been broken

down, possibly under gas, and perhaps the fingers put in a splint and his little finger removed, in your opinion would he not have a fairly useful hand—a hand much better than the one that he has at present?

A. I would like to ask if the question prior to this referred to the hand.

Q. No, it did not.

The Witness: Read the question.

(Question read.)

A. Well, the hand would possibly have been some better than it is at present.

Q. And considering that this is his left hand, he would have had a fairly useful hand for his left hand, if that had been done?

A. Well, there would have been considerable disability remain, I believe.

Q. But do you not agree with Doctor Clyne that if that had been done, Hammer would probably have had a fairly useful hand?

115 A. Well, that would depend upon what you mean by a fairly useful hand. It would not have been a normal hand nor nearly as useful as a normal hand.

Q. It would have been what to an ordinary man would be a fairly useful hand, if he could have gotten use out of it, if he had put it to some gainful occupation.

A. Yes, he would have gotten some use out of it.

Mr. Elliott: That is all.

Redirect examination.

By Mr. Curley:

Q. He can still get some use out of it?

A. Yes, he can.

Q. Doctor, when you stated a few moments ago that you considered in time that the scars on Mr. Hammer's legs would reach such a state of healing that they would not cause him any considerable inconvenience, did you have in mind the injury to his left knee?

A. Well, I think that injury probably deeper than the skin, and that the ligaments there are injured.

Q. If that be true, will that ever become in such a condition that he will be relieved from inconvenience from it?

A. No, I don't think that that could ever recover entirely.

Mr. Curley: That is all.

(Witness excused.)

JANE E. HAMMER, called as a witness on behalf of the plaintiff herein, being first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Kearney:

Q. You may state your name, please.

A. Jane E. Hammer.

Q. Are you the wife of the plaintiff, Joseph B. Hammer?

A. Yes, sir.

Q. Whereabouts do you live?

A. Morenci, Arizona.

Q. Do you remember when Mr. Hammer got burned in the Smelter?

A. I do.

Q. Did you see him that day?

A. I did.

Q. Where did you see him?

A. At the hospital.

Q. You saw him when they took him to the hospital?

A. Well, about a half an hour afterwards I went over.

Q. What was his condition when you saw him?

A. Well, when I saw him, he had his hands and face and his limbs all bound up, and he was in terrible pain when I saw him. He hardly knew me.

Q. Did he appear to know what was going on at the time?

Mr. McFarland: Now, if your Honor please, I am perfectly willing for the counsel to ask the witness what he did

116 The Court: Do you object to that question?

Mr. McFarland: Yes, sir, I do.

The Court: Objection sustained.

Mr. Kearney:

Q. And what was his condition at that time, you say?

A. Well, he was in terrible pain.

Q. How long was he in the hospital?

A. Why, I think about four weeks.

Q. Did you take care of him in the hospital?

A. I did, I was there every day and the night, off and on.

Q. What?

A. I was there every day and every night, off and on, as the family would relieve me.

Q. Did he require someone to sit up nights with him?

A. Yes.

Mr. McFarland: If your Honor please, that is an opinion, I am perfectly willing that the witness shall state what she knows and what she saw, but as to expressing an opinion, I object to it, unless she qualifies as an expert witness.

The Court: She may state whether or not he was attended at

night, but whether or not, in her opinion, he required, it seems to me, is calling for an opinion.

Mr. Kearney:

Q. In your judgment, did he require attention at nights, as well as days?

The Court: I say I sustain the objection to that.

Mr. Kearney: How?

The Court: I said I would permit you to prove whether or not he was attended day and night by a nurse, but her opinion as to whether it was necessary is objectionable.

Mr. Kearney:

Q. State whether or not he was attended day and night by the nurses.

A. No, he could not use his hands, and for that reason someone had to be with him. He could not help himself in any way.

The Court:

Q. Then, he was attended day and night?

A. Day and night, yes.

Mr. Kearney:

Q. And did you take care of him there?

A. I did.

Q. For what length of time? You stated about five weeks. Well, now, during that time, say the four or five weeks in the hospital, was he in considerable pain?

A. Yes, he was.

Q. And after that, he was well enough to leave the hospital, 117 or sufficient so that he could go to your home, or not?

Mr. McFarland: I object to that question as absolutely leading and suggestive.

The Court: I think that is too leading. Let her state the facts, if counsel does not object.

Mr. Kearney:

Q. After he was in the hospital, where did he go after that?

A. He came home.

Q. At home?

A. Yes.

Q. And was he under treatment then at home?

A. Yes, sir.

Q. For what length of time?

A. Oh, I don't just remember, but away along in the summer, he was under the Doctor's care.

The Court: Mrs. Hammer, the farthest man in the Jury must hear your statements. Will you please speak a little louder. They will hear you much better.



Mr. Kearney:\*

Q. You say along in the summer; you mean July or August?

A. I think in July, I think up until July.

Q. His injury was in December?

A. The 28th of December.

Q. Then, up to July, did he continue to suffer pain?

A. Oh, yes, he has pain right along.

Q. During that time, from the time of his injury up until July, was he under the treatment of the Doctors?

A. Yes, he went to the Hospital every day.

Q. He went to the Hospital every day for treatment?

A. Every day for treatment, yes.

Q. Now, how did he get to the Hospital? Did he go unaided or not?

A. Well, the first few weeks that he was home, my daughter had to take him over, had to lead him over, and lead him back. He was too weak to walk alone.

Q. State whether or not, since his injury up to the present time, he rests well or no, of nights?

A. No, he does not. There isn't any night that he goes to sleep until almost morning. Sometimes it is daybreak before he goes to sleep, with the pain in his hand and in his limbs.

Q. Anything of that kind occur before his injury?

A. No, he was perfectly well.

Q. What was the condition of his health before these injuries?

A. Oh, he had good health, fine health.

Q. He had good health?

A. Yes, he had splendid health.

Q. You, of course, know the condition of his left hand being closed there. Did you ever have a conversation with Dr. Smith about the condition of his hand?

A. Yes, I did. In March, why, my daughter was in the  
118 hospital sick, and the day that I took her home, I was out in the hall waiting for her, talking with Doctor Smith, and I says, "Doctor, do you think Mr. Hammer will ever be able to do anything again?" "Well," he said, "It is very doubtful, Mrs. Hammer." And the nurse also told me the same thing. Mrs. Myers, she told me.

Mr. McFarland: Never mind, I object to what Mrs. Myers said.

The Court: Objection sustained, and the last part of the answer may be stricken out, because it is not responsive to the question.

Mr. Kearney:

Q. Doctor Smith said it would probably be doubtful?

A. Yes, he did.

The Court: Now, was Doctor Smith the doctor who attended him?

Mr. Kearney: Doctor Smith was his physician.

The Witness: Doctor Smith.

Mr. Kearney: The one that was attending him, so I understand.

Mr. McFarland: We admit that Dr. Smith was the surgeon that treated him.

The Court: Have you any objection to the confidential communication?

Mr. McFarland: Well, if they want to break down the barriers, we will let Doctor Smith testify.

Mr. Kearney: That is all.

Cross-examination.

By Mr. McFarland:

Q. You say you are the wife of Mr. Hammer?

A. Yes.

Q. Did you see Mr. Hammer—how long after he had been taken to the hospital after the injury?

A. About half an hour.

Q. Half an hour?

A. Yes.

Q. And you were with him more or less from that time?

A. Yes.

Q. Until he left the hospital?

A. Until he left the hospital.

Q. Of course, you have been with him since he came out.

A. Yes.

Q. That is practically all you know about it, isn't it?

A. Except what I have talked—

Q. Excepting the conversation that you have testified to between yourself and Doctor Smith; that is practically all?

A. Yes, that is all.

Q. You don't know anything about how the injury occurred?

A. No, I don't.

119 Q. From your personal knowledge?

A. No.

Q. You weren't anywhere near the smelter at the time?

A. No.

Q. And you didn't know anything about it until after Mr. Hammer had been brought up to the hospital?

A. No.

Q. And all the information you have you have gained from him?

A. Yes.

Q. Didn't Doctor Smith in the conversation that you have detailed between himself and yourself, tell you that if Mr. Hammer would permit his hand to be treated by what is understood as breaking down, pressing it back and manipulating it, that it could be made a fairly useful hand?

A. No, he did not.

Q. He did not tell you that?

A. No.

Q. Mr. Hammer never told you that Doctor Smith had made such a request of him, did he?

A. Well, he may have asked him later on. This was in March.

Q. This was in March?

A. This was in March that I was speaking to him.

Q. You weren't present then when Doctor Smith told Mr. Hammer that if he would submit that hand——

A. No.

Q. —to manipulation in a certain way that he would have a fairly useful hand made out of it; and that Mr. Hammer refused to have the treatment done?

A. No, Mr. Hammer came to me and told me that Doctor Smith had suggested that.

Q. Had suggested it?

A. Yes.

Q. And he refused to have it done?

A. No, we talked about it.

Q. And he refused to let Doctor Smith do it; that is the idea?

A. Well, our living depended upon that, and I knew what Doctor Smith had told me, that he did not think it would ever amount to anything; and of course, we thought there was no use of any more suffering.

Q. Now Mr. Hammer, as I understand you, did say that Doctor Smith had suggested that treatment of his hand?

A. He had suggested that, yes.

Q. And Mr. Hammer had refused to have it done?

A. Well, he did not tell me he had refused that day. He came over and we talked it over, and I remember what Doctor Smith told me that he did not think his hand would ever amount to anything, and we thought there was no use of any more suffering. If it wasn't going to amount to anything, it might just as well stay the way it was.

Q. And that is the reason Mr. Hammer did not have it done? On account of what Doctor Smith had told you previously; that is, that it was doubtful about his ever recovering the usefulness of that hand to any extent; that was the idea? I understood you to say that Doctor Smith had told you, Mrs. Hammer, in a conversation that he thought it was doubtful whether Mr. Hammer would ever regain the usefulness of that hand?

A. Yes, he did.

Q. Now, later on, as I understand you, Mrs. Hammer, he suggested to Mr. Hammer that he have that hand treated.

A. Well, he had been treating it for a long time.

Q. Well, didn't he say that if Mr. Hammer would have that hand treated by what is known as breaking down, pressing back the fingers by manipulation or otherwise, that he would recover a fairly  
120 useful hand?

A. Yes.

Q. Yes, that is true, isn't it?

A. That is true, but——

Q. Mr. Hammer told you——

The Court: She started to make some further explanation of that statement. Now, explain.

The Witness: But we knew by another party that had had his hand broken down there and it didn't do any good; his hand is just the same as it was.

Mr. McFarland: I see.

The Witness: Yes.

Mr. McFarland:

Q. And that is the reason that Mr. Hammer objected to having his treated that way?

A. Well, I suppose from what Doctor Smith told me, and this other party who had had his broken down, and it didn't do any good; so we did not think there was any use of Mr. Hammer's suffering any more.

Q. Yes, I see, Mrs. Hammer. The two reasons why he objected to it were that Doctor Smith had told you before that it would be impossible to restore that hand to what we understand as a useful hand; that is one; and the other one is that you had known of another party whose hand was in a similar condition; being broken back, and that party never recovered the use of his hand?

A. Yes.

Q. And that is the reason Mr. Hammer declined to have his hand treated?

A. Yes sir.

Q. And that is what Mr. Hammer told you?

A. Yes, we talked it over.

Mr. McFarland: That is all.

Redirect examination.

By Mr. Kearney:

Q. The person that had his hand broken down and pulled back that you mention, that was Mr. Latham, was it not?

A. I think that was his name.

Q. Doctor Smith did that job, too, didn't he?

A. He did.

Q. He never recovered the use of his hand either?

A. No.

Q. Doctor Smith did that job?

A. He did that, yes.

Q. Was that a burn?

A. Why, I don't remember, Mr. Kearney, what it was, but I know his hand was terribly crippled. I don't remember what it was, however.

Mr. Kearney: That is all.

Recross-examination.

By Mr. McFarland:

Q. Mrs. Hammer, what was the name of that party, if you remember?

A. What is that?

Q. What is the name of the party that you refer to?

A. Mr. Latham.

Q. His hand did not yield to treatment?

A. No, his hand was crippled.

121 The Court: Who was the party?

A. Ledden, I think his name is.

Mr. Elliott: Latham?

The Witness: Yes, that is it.

Q. Latham?

A. Yes.

Mr. McFarland:

Q. Now, you say that the injury caused to Mr. Latham's hand was not the result of a burn?

A. I don't know.

Q. Well, now, as a matter of fact, Mrs. Hammer, don't you know that Mr. Latham got his hand mashed out there at the smelter, absolutely crushed to a pulp?

A. Well, I know his hand was similar to Mr. Hammer's. It was drawn.

Q. It was not similar?

A. Drawn up, something like Mr. Hammer's was.

Q. I understand, but it was not caused—the injuries were not the result of the same cause?

A. I couldn't say.

Q. You don't know about that?

A. No.

Mr. McFarland: That is all.

Mr. Kearney: The plaintiff rests, your Honor.

Mr. McFarland: If your Honor please, I would like to have the privilege of asking two witnesses introduced on the part of the plaintiff, on one or two questions on re-cross examination. If I would be permitted to do that later, I won't detain the court now.

The Court: No, you had better do it now so as to give the plaintiff the benefit of it.

Mr. McFarland: I would like to ask Mr. Bentley a question and also Mr. Hammer.

The Court: Is there any objection to the witnesses being recalled?

Mr. Curley: No, we have no objection.

JOSEPH B. HAMMER, the plaintiff herein, recalled to the stand for further cross-examination by Mr. McFarland, testified as follows:

Q. You testified, as I understand, yesterday—on Wednesday evening, that you had occupied, or that you had been a foreman, boiler-maker foreman. Now, I want to ask you what are the duties of a boiler-maker foreman?

A. I hadn't stated that I was a foreman in—as a boiler-maker foreman.

Q. Well, did you state that you had occupied the position of foreman in any other respect?

A. Yes sir.

Q. What was that?

A. In Steel foundries.

122 A. Well, now, what are the duties of a foreman in a steel foundry?

A. To carry out the work, see that it is properly done—give orders and see that the work is done, hire men, dispose of them those that are not efficient.

Q. Would that position necessarily cause you to use your left hand in that position?

A. Oh, yes, at times.

Q. Well, the fact that you hired people and directed them and discharged them, would not involve the use of your left hand, would it?

A. Oh, yes, at times in order to carry the work out, the foreman assists his men, and sometimes—and sometimes he is short-handed, and he has to help.

Q. But the fact that the duties of the office involved hiring and the discharge of the men, and their direction, would that involve the use of your left hand?

A. No, not to discharge them; no sir. I could discharge them with one hand, I suppose.

Q. You couldn't direct them with one hand?

A. Yes.

Q. And employ them with one hand. So that the fact that you are disabled in your left hand would not necessarily involve the duties of foreman?

A. Yes, it would, according in what capacity the foreman has. In some shops a foreman has to do considerable of the work. He may have a bunch of twenty or thirty men, and still be leading the certain job they are on, and he has to work and perform labor.

Q. That injury would not keep you from performing the duties of foreman as much as it would if you were a laborer under the foreman?

A. Oh, no, probably not quite so much. It would handicap me in taking certain positions.

Q. Well, now, the fact that you have that burn on that hand, would that disqualify you from acting in the capacity of a foreman?

A. Well, that depends now. If I would apply to a shop where I wasn't known it would disqualify me.

Q. It might and it might not?

A. Oh, yes, there is no might about it nowadays.

Q. Absolutely so?

A. Absolutely.

Mr. McFarland: That is all.

Redirect examination.

By Mr. Kearney:

Q. It is pretty hard to get a position now, ain't it, as a foreman?

A. Yes, it is a hard matter to get a position.

Mr. McFarland: If the Court please, I object as not proper cross-examination.

The Court: Well, it was answered before objection.

Mr. McFarland: What is that.

The Court: I say it was answered before an objection was interposed. Any further questions?

Mr. Kearney: No.

123 The Court: Stand aside, Mr. Hammer.

Mr. McFarland: Now, Mr. Bentley.

ELMER BENTLEY, called as a witness on behalf of the plaintiff, resumed the stand for further cross examination by Mr. McFarland, and further testified as follows:

Q. You were sworn yesterday or the day before yesterday, and testified?

A. Yes sir.

Q. And you testified that you saw this car come on the feed-floor?

A. Yes sir.

Q. And from there until it came to where Mr. Hammer was in the hopper?

A. Yes.

Q. Now, where was the exact position that you occupied when you saw the car from the time of its coming onto the feed-floor until it passed over the hopper in which Mr. Hammer was working?

A. I was standing on a ten-inch air pipe that runs along.

Q. Was that on the feed-floor?

A. No sir.

Q. Where was that?

A. That was right opposite the feed-floor.

Q. Opposite?

A. Yes sir.

Q. In another part of the smelter?

A. Well, it is not exactly another part of the smelter. It is about four or five feet off of the floor. I should judge.

Q. Four or five feet off of the floor?

A. Yes.

Q. What do you mean by off of the floor?

A. I mean it does not run along on the floor. I mean it is to one side.

Q. One side?

A. Yes sir.

Q. Which side would that be of the car coming on the feed-floor?

A. Which side of it?

Q. Yes.

A. It would be on the righthand side if you were looking east.



Q. What distance would that be from the track on which the calcine car came in?

A. It would be twenty-five or twenty-six feet.

Q. Twenty-five or twenty-six feet?

A. Yes.

Q. Now, what were you doing at that time?

A. I went out there to repair some work for Mr. Neilson on this pipe work.

Q. What work?

A. Pipe work?

Q. There was no obstruction between you and the car at any time?

A. Sir?

Q. There was no obstruction between you and the car at any time?

A. No sir.

Q. Anybody present with you at that time?

A. Anybody present with me?

Q. Yes.

A. Mr. Nielson was along.

Q. Mr. Nielson was there?

A. Yes sir.

Q. That is Joe Nielson?

A. Harry.

Q. He was the foreman, was he not?

A. Yes.

Q. Well, could he have seen the car from the same point?

A. From where he was standing; no sir.

Q. What would prevent him from seeing it?

A. Because he was down below me.

124 Q. What was he standing on?

A. Sir?

Q. What was he standing on below?

A. He was standing on the ground.

Q. On the ground?

A. Yes sir.

Q. And you were how many feet above him.

A. I should say I was six or eight feet.

Q. Above him?

A. Possibly a little more.

Mr. McFarland: I think that is all.

Mr. Kearney: That is all.

(Plaintiff rests his case.)

Mr. McFarland: We were going to precede this witness that is called, by Mr. Fraser. He has a blue-print of this situation, and it would be much more satisfactory to the jury to have a correct view of the situation on top of the feed-floor of that smelter.

The Court: Where is he?

Mr. McFarland: He is having a drawing made of another situation, and I told him I did not think we would need him before an hour, and he said he would be back in an hour. That is the situa-

tion. But rather than delay the court we will introduce one witness, I think, and probably he will be here by the time we are through with him.

ESTANISLADO PROVENCIO, called as a witness on behalf of the defendant herein, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. McFarland:

Q. What is your name?

A. Estanislado Provencio.

Q. Where do you live?

A. I live in Clifton.

Q. How long have you lived there?

— Oh, I have been living there most of my life.

Q. What have you been doing while you were living at Clifton?

A. I have been working at the foundry, and that is all I have been doing.

Q. Foundry and what?

A. Foundry works.

Q. Have you ever worked for the Arizona Copper Company?

A. Yes, sir.

Q. How long?

A. I work there about five years.

Q. What work were you doing during those five years?

A. Running a motor.

Q. Motor, is that all?

A. Yes, and work at smelters and the foundry work.

Q. Anything else?

A. That is all.

Q. Where were you born?

A. I was born in El Paso.

Q. Were you working for the Arizona Copper Company in December, 1914, which will be a year ago the coming December?

A. Yes, I work there in December.

Q. What were you doing then?

A. I was running a motor, calcine motor.

Q. What was the power that propelled the motor; what was the power used?

125 A. That is——

Q. Steam or electricity?

A. Electricity.

Q. How long had you been running that motor?

A. I had been working for a year on that motor.

Q. What is that motor used for?

A. It is used for to put the charge in the reverberatory there.

Q. Where did you get the charge that you put in the furnace?

A. I get them from what they call the roasters.

Q. Now, how did you get the material that you carried from the

roasters to the reverberatory furnaces? How did you get it from the furnace, from the roaster to the furnace?

A. Well, they got some hoppers up there to fill that motor, you know, they got some.

Q. Did you carry that material from the roasters to the hoppers in a calcine car?

A. How is that.

Q. Was it a calcine car that you used to bring this material from the roasters to the smelter?

A. Yes, sir.

Q. I mean, not the smelter but the furnaces?

A. Yes, sir.

Q. Who run the motor that carried that material.

A. I do.

Q. How long had you been on that motor?

A. About a year I say.

Q. Now, were you running that motor on or about the 28th day of December, 1914?

A. Yes, sir.

Q. What do you call the stuff that you take from the roaster to the furnaces?

A. They call it calcine.

Q. Well, now, on that day did you take any calcine from the roasters to the reverberatory furnace?

A. Yes, sir.

Q. How many times did that car haul calcine from the roaster to the reverberatory furnace on that day, if you remember?

A. That would depend on how the furnace is, you know. Sometimes you bring six loads; sometimes bring eight loads in the shift, in eight hours.

Q. Eight Hour shift?

A. Yes.

Q. You don't remember of having brought that material from the roaster to the smelters on the 28th of December?

A. Yes, sir; I am sure.

Q. Do you remember when Mr. Hammer was injured, burned?

A. How is that?

Q. Do you remember when Mr. Hammer was injured by being burned?

A. Yes, sir.

Q. Well, now, on that day did you haul any calcine from the roasters to the smelters?

A. Yes, sir; I carried some that day.

Q. Do you remember about the time of day that Mr. Hammer was burned in the hopper?

A. That was—what I remember the 28th there, about two o'clock, something like that.

Q. About two o'clock?

A. Yes, half-past two; I can't be very sure.

Q. Well, now, at the time he was burned with this calcine or just

before he was burned with this calcine, did you bring a car of that material from the roasters onto the feed floor of the smelter there?

A. Yes, sir; I did.

Q. You did?

A. Yes sir; I had been hauling all the morning: you know, from the roasters to the furnace.

Q. Well, now at the particular time, what did you do with your car when you came onto the feed-floor in reference to the hopper in which Mr. Hammer was working?

126 A. Well, I used to stop with my car every time, so they make me a sign to pass, and after they make me a sign—

Q. Stop the car?

A. Yes, stop every time I go. Them fellows, where they was working, you know.

Q. About where did you stop this car in reference to the hopper that Mr. Hammer was working in?

A. Over twenty—or twenty-five feet.

Q. How many?

A. About twenty or twenty-five feet.

Q. About twenty—or twenty-five feet?

A. Yes.

Q. What did you do that for?

A. Well, I did that to give them time to get out of danger, you know.

Q. Well, now, when you stopped at that distance from this hopper at which he was working, did you see Mr. Hammer?

A. No, sir.

Q. Didn't see him?

A. No, sir. I did not see him.

Q. Was the hopper in plain view of you when you stopped?

A. How is that?

Q. Was the hopper that Mr. Hammer was in, was that in plain view of you; could you see that?

A. Yes sir; I could see that.

Q. Did you know that he was in that hopper; did you know that he was working in that hopper?

A. Yes, I know that he was working in that hopper.

Q. You had seen him work there several times before when you came in to the furnace, on that day?

A. No, I never saw him in that hopper. I saw him in some other hoppers inside there.

Q. Had he been working in that hopper that day previous to the injury?

A. Yes, he was working that day.

Q. And you had hauled a good many loads in there, you say, before that?

A. How is that.

Q. How many trips had your car taken before that?

A. Oh, before that? Oh, about four trips, I guess.

Q. Now, what did you do in those previous trips when you got up close to the hopper in which Mr. Hammer was at work?

A. What did I do?

Q. Yes, when you came along that feed-floor and would get up close to where Mr. Hammer was at work, what did you do with the car?

A. Well, I stopped.

Q. You stopped?

A. Yes sir.

Q. Well, then, what did Mr. Hammer do when you stopped?

A. Well, he used to get out of there.

Q. Did he do it on each of the previous four trips you made that morning?

A. Yes sir.

Q. Well, was anybody to notify Mr. Hammer that the car was coming?

A. Yes, sir.

Q. Who was that?

A. That was his helper.

Q. Helper?

A. Yes sir.

Q. Now, what did he do on these previous trips when his helper would notify him that the car was coming?

A. He used to get out.

Q. Get out of the hopper?

A. Get out of the hopper.

Q. Did you see anyone notify him at this particular time? Did you see anyone notify him to get out of the hopper that he was injured in?

A. Yes sir.

Q. Who was it?

A. It was his helper.

Q. What did his helper do, if you know?

127 A. Well, his helper—his helper was not working with him, you know. He was in the center of the track, you know, and he was right near where he was, that hopper was, you know.

Q. Well, now at this particular time he was injured, what did you see the helper do?

A. I saw him make me a sign to pass.

Q. Well, did you see him go to the hopper?

A. Yes, sir.

Q. But you couldn't see Mr. Hammer?

A. No, I couldn't see Mr. Hammer.

Q. And he went to the hopper now, as I understand you?

A. Yes, sir.

Q. Then what did he do?

A. He went to the hopper and he told Mr. Hammer to get out.

Q. Could you hear him tell him that?

A. No, I saw him talking to him. I don't know what he said.

Q. You saw him go to the hopper, however.

A. Yes sir.

Q. And then what did the helper do?

A. Then the helper make me a sign to pass.

Q. What, to come on?

A. Come on.

Q. Did you see any other sign?

A. No sir.

Q. That is all you saw now, was it?

A. That is all I saw.

Q. And you in obedience to his signal, you passed on?

A. Yes sir.

Q. Up to the hopper, and how far did you go past it, if you went past it at all?

A. Oh, about five feet, about five feet.

Q. Five feet. When was the first time that you knew that Mr. Hammer was in that hopper?

A. I did not know that he was in that hopper before.

Q. Did you hear any cries, any noises, anybody holler?

A. No, I never seen nobody.

Q. Was there much noise up there?

A. Yes, there was noise but it was pretty far where I was, you know, where I was standing behind the hopper, you know.

Q. I didn't hear the answer to that last question.

A. I say I never heard no noise. It was pretty far where I was you know.

Q. From the hopper?

A. From the hopper, about twenty or twenty-five feet.

Q. The back end of your car, I understand, went four or five feet beyond the hopper?

A. Yes.

Q. The back end of your car?

A. Yes sir.

Q. Is there not a lot of noise up there from the machinery?

A. Yes, the steam and everything of that machinery, you know.

Q. Steam?

A. Yes sir; steam there.

Q. Now, all you depended on in the movement of your car was the signal from Mr. Hammer's helper?

A. Yes, sir.

Q. When he signalled you to come on you would come?

A. Yes sir.

Q. Did you on this occasion as well as on other occasions while Mr. Hammer was working on that feed-floor, stop within twenty—or twenty-five feet of the hopper?

A. Yes sir.

Q. The hopper he was workin in?

A. Yes sir.

Q. You never failed to do that?

A. No sir.

Mr. Curley: I object to those leading questions, if your Honor please.

128 The Court: Well, you will have to object before they are answered.

Mr. Curley: I tried to get it in before, but I hope counsel will refrain from leading this witness.

The Court: Proceed.

Mr. McFarland:

Q. How many hoppers, so far as you know, were repaired by Mr. Hammer on that feed-floor?

A. Well, I am not very sure. I believe there was about two or three hoppers, I guess.

Q. It might be four or five. Now, tell the jury what was your habit in respect to stopping your car, if you did stop it, any distance from the hopper in which Mr. Hammer was engaged in work.

Mr. Curley: I object to that as immaterial.

The Court: I will sustain the objection, because the witness has already testified that he always stopped without any exception when he got about twenty-five feet from the hopper, and that went in without objection. I sustain the objection to the last question.

Mr. McFarland:

Q. Was anybody else——

The Court: Then I also sustain it upon the ground that the witness may not testify to his habits on previous occasions.

Mr. McFarland: May I amend that and ask him what he did?

The Court: Yes.

Mr. McFarland:

Q. What did you do in reference to stopping your car when you approached a hopper in which Mr. Hammer was engaged at work.

Mr. Curley: Objected to.

The Court: Objection sustained, because the witness has already answered the question.

Mr. McFarland:

Q. Who was on that feed-floor besides yourself and Mr. Hammer's helper, if you know, on that day?

A. On that day? Well, I don't know. I seen his helper and the other fellow working in one of those fettling cars; that is all I know.

Q. Was Mauro Provencio there at that time?

A. Yes, that is his helper.

Q. That is his helper. Well, was Gustavo Provencio there?

A. Gustavo was, yes. He was running that fettling car.

Q. Running what kind of a car?

A. Fettling car.

Q. How was that run?

A. Well, that is a small car, you know; they have to push it, you know.



Q. They have to push it?

A. Yes.

Q. You say you saw him there at the time Mr. Hammer was injured just after Mr. Hammer was injured, or just before?

129 A. He work there all day, that fellow, running that car.

Q. All day?

A. Yes, he work all day.

Q. And did you see him there at the time, either before or just after Mr. Hammer was injured.

A. Yes, I saw him with a broom there sweeping the track with the broom. I saw the fellow, Gustavo.

Q. Do you know Mr. Bentley?

A. Yes, I don't know him; I just know him——

Q. Did you see him there at the time Mr. Hammer was injured?

A. No, I never seen him.

Q. Either before or after?

A. I saw him after he comes.

Q. After?

A. Yes sir.

Q. Did you see him before?

A. No sir.

The Court: I did not understand one answer of this witness, or the question either. May I ask him a question here?

Mr. McFarland: Certainly.

The Court:

Q. When your car reached the point where Mr. Hammer was hurt, did it stop?

A. Yes sir; I stopped about five foot, you know, five foot behind, you know. After I passed from the hole, you know.

Q. Before you reached the hole?

A. Oh, twenty or twenty-five foot, I say.

Q. Then did you stop when you got over the hole, when your car was right over the hole, did you stop then?

A. No sir; no sir.

Q. You did not stop?

A. No.

Q. Why did you stop when you got on the other side of it?

A. Why, I stopped to help Mr. Hammer get out, you know.

Q. How did you know he was in there?

A. How?

Q. How did you know that he was in there?

A. Well, I did not know he was in there; after I saw him the car passed you know.

Q. Did you see him or did you hear him?

A. I hear him there.

Q. Had you passed over the hole when you heard him?

A. When I heard him crying?

Q. Yes.

A. Yes, I passed over the hole when I heard him.

Q. You stopped the car to assist?

A. Yes, to help him out.

Juror Rider: If the Court please, may I ask the witness a question.

The Court: Yes.

Juror Rider:

Q. Were you working under orders each trip? Did you have a special destination to make each trip?

The Court: Well, he probably does not understand what destination means.

Juror Rider:

Q. Well, did you have a special—anyone place to stop? On that trip where would you have stopped if you hadn't received any signal?

A. No, I did not.

Q. If you hadn't received any signal where would you have stopped under orders, or your custom?

A. About thirty foot, thirty-five.

130 Q. Of where?

A. From the hole, you know, from this place, you know.

Q. From which place?

The Court: He wants to know where you were going with the calcine.

The Witness: With that, where I was going with that car?

The Court: And where you would stop with it, where you would have stopped with it if you hadn't stopped there at that time.

The Witness: Oh, I was going to get some lime, you know, to put in the car.

Juror Rider: That was on beyond that place?

A. Yes, mix it with that stuff.

Juror Rider: I just wanted to know what the destination of the car was.

The Court:

Q. How far beyond that place was it where you were to have gotten the lime?

A. Why, about forty feet, I guess.

Q. About forty feet?

A. All right.

Juror Rider: I just wanted to know what the destination of the car was, how it came to go over there.

Juror Wheat:

Q. Did they run that car at regular intervals, or was the car run just when it was necessary to fill it?

The Court: He probably does not understand what regular intervals means.

Juror Wheat: Well, frame it up.

The Witness: I would like to—

**The Court:**

Q. How often did the car run from the place where you got the calcine down to the place where you were to get the lime?

A. Well, I say just about forty feet.

Q. No. How, often I say; did you run every hour or every half hour? Did it have a scheduled time?

A. Yes, it run about every hour, I guess—put a load in there.

Q. Just about every hour?

A. Every hour.

**Mr. McFarland:**

Q. Would that depend upon the needs of the furnace, how often you brought calcine in there; how often the furnace needed it?

A. Yes, that depends how the furnace is, you know.

Q. Would anybody tell you when to go and get the calcine and when to bring it back?

A. Yes sir; they tell me when the charge.

Q. Who was that would tell you that?

A. The skimmer, you know.

Q. The skimmer, he told you when to go after the calcine?

131 A. Yes.

Mr. McFarland: I understand the juror to ask the question if he stopped uniformly at some point.

Mr. Rider: My question was, Mr. Counsel, what was the destination of the car and where would he have stopped if he had not received any signal. I just wanted to know where the car was accustomed to go. That was my object.

**Mr. McFarland:**

Q. Do you know whether or not it was the intention to release that calcine in the hopper in which Mr. Hammer was engaged in working; was it the purpose to put the calcine down in that hopper?

A. No, that furnace that they was repairing, you know. We couldn't put no calcine in that hopper there.

Q. Now, you say that the purpose of going over that track was to go to a bin that held——

A. Lime, you know.

Q. —lime, and then what was the destination of the car from that lime bin.

A. Well, I don't know. They got——

Q. Had you any instructions as to that?

A. Yes, I had instructions, you know. I got to mix it up with the calcine, and then put it in the furnace again, you know.

Q. It wasn't your intention to discharge that calcine into the hopper in which Mr. Hammer was at work?

A. No.

Q. It wasn't your intention to put that calcine in there?

A. No, I had no intention.

Q. What did you stop for after you got over the hopper in which Mr. Hammer was at work?

A. How is that? I didn't hear you.

Q. Why did you stop after you passed over the hopper in which Mr. Hammer was at work? Why did you stop?

A. Why, I stopped to help him out of there.

Q. How was it that you knew that Mr. Hammer was in that hopper? How did you know he was in there?

A. I didn't know he was in there. After I got by I know, after.

Q. I know, but what called your attention to the fact that he was in there? What was said or done by anybody that you found out that Mr. Hammer was in there? How did you know he was in there?

A. How I knew he was in there?

Q. Yes, how did you know Mr. Hammer was in there after you passed over him?

A. Well, I see him.

Q. Did anything——

A. I stopped my car.

Q. Did you hear him?

A. Yes, I hear him, you know.

Q. What time was that?

A. What?

Q. When your car was passing over him?

A. Yes, when the car was passing over him.

Q. Then did you see him after you looked back, after you stopped?

A. Yes, after I stopped, I see him.

Q. Did you see that calcine flowing out of that car?

A. No sir; I did not see it until after I stopped the car, you know.

Q. You saw the calcine after you stopped the car?

A. Yes sir.

132 Q. Well, did that indicate to you that there was something wrong?

A. I didn't see anything wrong, I guess.

Q. If you had seen the calcine flowing out of that car without its being turned loose, wouldn't you have thought that there was something wrong?

A. I thought they leave——

Q. What?

A. I couldn't tell about that accident, because I was inside of the car, you know, I couldn't know anything.

Q. You don't know what caused it?

A. No, I didn't know.

Q. Well, was that car in good condition?

A. I think so.

Q. So far as you knew?

A. Yes.

Mr. McFarland: Cross-examine.

## Cross-examination.

By Mr. Kearney:

Q. How many tons of calcine did that car hold?

A. Well, about fifteen tons.

Q. How many thousand pounds in each ton?

A. Two thousand.

Q. Two thousand?

A. Yes sir.

Q. How does the calcine get out of the car?

A. Well, you have to open some drawer they have, you know.

Q. Is that opened with a lever?

A. Yes sir, they have got some handles to open, you know.

Q. That lever pulls a little hard, don't it, too?

A. Yes, sir.

Q. And the hopper in which Mr. Hammer was doing this repair work was not in use that day at all, was it?

A. No sir; it was not in use at all.

Q. You had no orders to dump any calcine in that hopper, did you?

A. No sir; I didn't have no orders to dump it in there.

Q. If that car had been all right, the valves properly closed, it wouldn't have dropped any calcine in that hopper, would it?

A. Well, I don't know. The car, I believe, it was all right. I don't know. I couldn't tell what happens, what happened to this, what happened to the door, you know.

Q. Is it a part of your duty in taking that car along to see that that door is closed?

A. No.

Q. Don't you open that door and let out the calcine?

A. Yes, I open it.

Q. Then it is your business to close that door and shut it, isn't it?

A. Yes, sir, it is my business to close it and shut it.

Q. Then it was your duty, and you went along there, to see that the door on that car that let the calcine out was closed?

A. Yes, it was closed.

Q. Then, if the bottom of that car, trap-door, that lets it out, had been closed——

A. Yes.

Q. —It would not have spilled any calcine?

A. No, it would not have spilled any calcine, no sir.

Q. So that you must have been bringing that car along there with the bottom of that car open?

A. No sir, it was closed.

Q. If it was closed, how did that calcine get out?

A. I cannot tell, it was an accident.

133 Q. It was an accident?

A. Yes sir.

Q. Did that kind of an accident ever occur there before?

A. No sir.

Q. You don't remember any time, do you?

A. No sir.

Q. When calcine dropped out of the bottom of that car?

A. No sir.

Q. If that car—that door that is the slide-door at the bottom had been properly closed——

A. Yes sir.

Q. —if it had been when it passed over where Mr. Hammer was working, it wouldn't have injured him, would it?

A. No sir.

Q. Then if the door there, as it should have been, was properly closed that car would have passed over where Mr. Hammer was at work without injuring him any—wouldn't have burned him, because no calcine would have poured down; isn't that true?

A. I don't understand you very much.

Q. You don't understand?

Mr. McFarland: We want to get all the information for the jury that we can, but we do not think what the car would do or would not do, or what the car should do, is at all material. I think the fact that an accident happened while this party was in the employment, caused from a condition or conditions of employment, while he was engaged in the particular employment for which he was engaged, would be the only question for the jury.

The Court: Well, do you remember that you asked this witness the question whether it was not—whether it was or was not the intention of the witness to pour this calcine in that particular hopper?

Mr. McFarland: Yes sir.

The Court: And the witness answered that it was not.

Mr. McFarland: That is true.

The Court: Now, isn't it proper on cross examination to explain how it happened to get in there?

Mr. McFarland: Oh, I think so.

The Court: Well, in doing that, isn't it impossible to do that without showing facts——

Mr. McFarland: As to the facts, of course, your Honor, I have no objection to his showing them.

The Court: Those are the facts.

Mr. McFarland: I called this fact to the attention of the witness—if it was his intention to discharge that calcine in that hopper. He said no, that his intention in carrying that calcine along that track was to go to get lime for flux.

The Court: I believe that it is proper cross-examination. I will overrule the objection.

Mr. McFarland: Note our exception.

134 The Court: You will have to re-frame that question because it embraces two questions and is not understandable.

Mr. Kearney:

Q. If the slide-doors on that car had been closed, the car would have passed over where Mr. Hammer was at work and wouldn't have burned him any?

A. No sir.

The Court: Now you ask two questions there. You ask him in the affirmative and the negative.

Mr. Kearney: This witness here knows.

Q. Do you mean that it would not have injured him?

The Court: Now you ask if it would have done so and so, and you ask if it wouldn't have burned him. The witness cannot answer that.

The Witness: I wish I had an interpreter, you know, so I explain better, you know.

The Court: Come around, Mr. Interpreter. Now, I don't mean to suggest to counsel how to frame their questions at all. It isn't with that desire, but if counsel on both sides will ask short questions, especially of witnesses who are not Americans—even where they are, I believe that they would understand better, and all of us would get a better understanding from their answers. However, you will frame the question to suit yourself. Proceed.

(The following testimony was given through the interpreter:)

Mr. Kearney:

Q. If the slide-doors on that car that let the calcine out had been closed, then that car would have passed over the hopper where Mr. Hammer was at work and none of the calcine would have been emptied into the hopper.

A. But the doors were closed.

The Court: That isn't an answer to the question. If the doors had been closed would the calcine have dropped out, run out?

A. No, it wouldn't have leaked out.

Mr. McFarland: Let him explain. What does he say, Mr. Interpreter?

A. The doors were closed, but I don't know what might have happened that opened the door.

Mr. Kearney:

Q. Then on your way down you think that something opened the door on that car?

A. I believe that something was left on the track that opened the doors.

Q. In coming down you didn't see Mr. Hammer at all, did you?

A. I didn't see him. I only saw his helper that was standing there in the middle of the track.

Q. You didn't see Mr. Hammer until you had passed over him?

A. Until I passed by.

135 Q. During the nine or ten months that you were motor-man on this car did such an accident as that happen before, that the slide-door of that car came open and allowed the calcine to spill out?

A. It never had happened anything like that before.

Q. Then in your movement of going forward you were guided by a motion that Mauro de Provencio gave you, is that right?

A. When he made me a sign I pass by.



Q. Is Mauro a relative to you?

A. He is a cousin of mine.

Q. And you had no idea that Mr. Hammer was there that day at work in that hopper, did you?

A. I had an idea that he was working in the other side of that hopper, on one side of that hopper.

Q. Now you say you had about how many years—how much experience in running a motor car?

A. About a year.

Q. Well, from December of last year up until September, 1911 of this year, were you running that car as motorman?

A. I don't remember the date when I began running that car, but I believe it is about a year.

Q. When did you quit running the motor car?

A. We work eight hours and we quit at three o'clock in the afternoon.

Q. Did you run that motor car from last December up until the 11th of September of this year?

A. I work a year on that car, but I don't remember the date that I began to work.

Q. Do you know whether you ran that car from December to the 11th of September of this year?

A. I run the car, I believe, in August it was. In August since I began to run the car.

Q. Did the company ever lay you off?

A. Never have suspended me from work.

Q. Since this accident they have laid off a good many men, haven't they, but they didn't lay you off?

Mr. McFarland: If the Court please, I don't think it is material whether a good many men were laid off, nor how many continued.

The Court: Objection sustained.

Mr. McFarland: Nor how many men quit on the 11th of September.

Mr. Kearney:

Q. Are you still working for the company?

A. No, we are not; everything is at a standstill over there now.

Q. Are you drawing any pay from the company?

A. Nothing only expenses now.

Q. Well, when did you quit?

A. The 11th day of September.

Q. That was when the strike was called on there, wasn't it, everybody quit?

A. Everybody quit then.

Q. Well, that was caused by a strike there, wasn't it, everybody quit?

A. Yes, on account of the strike.

Q. What do you mean by expenses, paid your expenses here?

136 A. Well, they are paying my room and my board.

Q. They are paying your expenses, some of them, when you were there?

A. No sir.

Q. Did you ever tell anybody what you could or would testify to as a witness if you were called on this trial?

A. I have not.

Q. When you run over Mr. Hammer did you go back and help get him out of the hopper?

A. I only helped to put out his clothes.

Q. Every time you brought a car down would you go over and get lime for it?

A. Every time. It was the standing order there, every time. That was the standing order I had.

Q. For every car?

A. Every car, every trip.

Q. Do you know how many yards in twenty-one feet?

A. A yard is thirty-six inches.

Q. What?

A. A yard is thirty-six inches.

Q. Did you ever have any special instructions in electricity?

Mr. McFarland: Well, now, if the Court please, I object.

The Court: Objection sustained.

Mr. Kearney:

Q. Didn't you make a statement at the time, just after Mr. Hammer was injured and burned there, when you were asked why you would not stop, or why you did not stop, or why you went over him, and that you then and there stated in response to a question asked by Mr. Bentley, didn't you make such a statement there to the helper that the brakes in your car would not work, or words to that effect.

The Court: Are you withdrawing your first question?

Mr. Kearney: That eliminates the first question about Mr. Bentley.

A. No, I never told him anything like that. I did not have an opportunity to speak to the helper. They took him away to assist Mr. Hammer.

Q. Don't you know, as a matter of fact, that the brake shoes on your car were tightened and repaired immediately after this injury?

Mr. McFarland: I object to what occurred after the injury, I object for another reason; that what counsel is attempting to show by that fact or by the inference from that fact, that the company was negligent.

The Court: Objection sustained.

Mr. Curley: Oh, no, if your Honor please, if you will permit me to argue after the ruling. The purpose of that was not for the purpose of showing negligence, but to impeach the testimony of the witness, where he has testified that he came down and he stopped his car and the like. Now the purpose of that was to impeach that; that he afterwards stated that the brake-shoes would not work was

the reason, and then ask him, as a matter of fact, that immediately afterwards if the brake-shoes were not repaired and tightened.  
 137 It is not for the purpose of showing negligence. That isn't the purpose at all. It is for the purpose of impeaching the witness.

Mr. McFarland: They might have been repaired afterwards, if your Honor please, but the question is did it stop then.

The Court: No, I don't think the question that was asked has reference to the failure to stop before the accident.

Mr. Curley: The first question was if he did not state at the time that they would not work. Now the next question was asked him if he did not know that immediately afterwards they were repaired, for the purpose of breaking down his testimony—not for the purpose of showing negligence; and the Court may so instruct the jury, that that isn't the purpose; that it is for the purpose of breaking down his testimony and not to show negligence.

The Court: Well, it being immaterial, Mr. Curley, you cannot impeach the witness on any question that is not material to the issue.

Mr. Curley: It is material as against his testimony that he came up and stopped, and that they further motioned for him to come ahead. Now, it has been testified to here by Mr. Bentley that the car came right straight down without stopping. Now the question is asked him if immediately after the injury he did not state to the helper when asked why he did not stop that his brakes would not work. Now, he has denied that. Now following that up, and for the purpose of still further impeaching his testimony, the question was asked if he did not know as a matter of fact that immediately after that, these brake-shoes were fixed. That is the purpose of it, if the Court please—not to show negligence.

Mr. McFarland: Well, if the Court, please, I do not think that would be material, because Mr. Hammer himself, stated that that car stopped about twenty-five feet or thirty feet before it reached that hopper in which he was in.

Mr. Curley: No, he did not.

Mr. McFarland: That is my recollection.

Mr. Curley: Your recollection is wrong.

Mr. McFarland: Well, the record will show.

The Court: Read the question.

(Question read.)

The Court: Objection overruled. Answer the question.

Mr. Curley: Just a moment, if your Honor please.

The Court: Let him answer if he can. I feel that you gentlemen must *no* speculate with the court in any such way.

138 The Interpreter: He is not answering your question.

The Court: Well, tell us what he says.

A. There was nothing wrong that I knew with the brakes.

The Interpreter: He is starting to explain how and he did not finish.

The Court: Go on.

A. There was nothing wrong with the brakes, or the shoes, or the brake-shoes. There must have been something left on the track that interfered with the doors.

The Court: The question is whether or not he stated immediately whether or not the brake-shoes were repaired,—the brakes were repaired immediately after he stopped, or after Mr. Hammer was injured.

The Witness: I testify that the brakes were not repaired, that they continued to use the car as it was.

The Court: Well, the question is whether you—I believe that answers the question. Stand aside. Call *you* next witness.

Mr. McFarland: It is twelve o'clock, if your Honor please.

The Court: Gentlemen of the jury, you are not to discuss this case among yourselves nor permit anyone else to discuss it in your presence or hearing, or form or express any opinion as to the merits of the case until it has been finally submitted, to you. Report at half-past one.

FRIDAY, November 26, 1915.—1.30 p. m.

The Court: You may proceed.

Mr. McFarland: I want to ask the witness who was on the stand just before the noon recess one question.

ESTANISLADO PROVENCIO called as a witness on behalf of the defendant, resumed the stand and further testified as follows.

Redirect examination.

By Mr. McFarland:

Q. In reply to a question—I think he can understand me, Mr. Interpreter without you. You testified just before the court adjourned at the noon recess in reply to a question that Mr. Kearney asked you, if you had talked to anybody about this case—you said no. Did you mean to include in that the attorneys of the company, or the defendant?

A. No sir.

Q. You have talked to me about it?

A. No sir.

139 Q. I say you have talked to me about it, haven't you?

A. No, I never spoke to anybody about it.

Q. Did you ever talk to me?

A. Oh, yes.

Mr. McFarland: That is all. That is what I want understood.

Recross-examination.

By Mr. Kearney:

Q. Immediately after this accident took place you were called down in Flynn's office and there you made a statement, didn't you?

A. Yes, sir.

Mr. Kearney: That is all.

(Witness excused.)

GEORGE W. FRASER, called as a witness on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. McFarland:

Q. Your name is George W. Fraser?

A. George W. Fraser.

Q. Where do you live, Mr. Fraser?

A. Clifton, Arizona.

Q. How long have you lived there?

A. Since the 10th day of November, '84; thirty-one years.

Q. What have you been doing in Clifton during those thirty-one years?

A. I was, while the old smelter was running, superintendent of the old smelter. At the new smelter I was general foreman of repairs.

Q. Foreman of—

A. I was general foreman of repairs of the new smelter.

Q. General foreman of repairs. As such foreman would the repair of fettling tanks or hoppers come within your jurisdiction?

A. Well, it did in a way although I had a foreman under me who usually looked out for the work.

Q. Your position was over that foreman?

A. No, over my instruction.

Q. Have you a blueprint of the feed-floor of the smelter?

A. Yes, I think I have a print here, and also of the hopper.

Q. Of the hoppers and your railway track?

A. And the railroad track, also.

Q. Is this blueprint a correct reproduction of the situation—

A. The exact situation.

Q. —on the feed-floor?

A. This is a blueprint from the construction, the man who put the hoppers in.

Q. Is it correct?

A. It is correct, as far as I know. They were put in according to that blueprint.

Q. And the situation there now is just as this blueprint shows?

A. Just as it shows there.

Q. And was on the 28th of December, 1914?

A. Yes, I think so.

Q. It is just the same now as it was then?

140 A. Just the same, that is the blueprint that the business was installed from.

Q. And it was installed just as this shows it?

A. Just as it shows it.

Mr. McFarland: Now, if your Honor please, I will ask to have it filed for identification as Defendant's Exhibit 1, I do not know just how we are going to manage it so that the jury can see the situation as shown by this blueprint.

The Court: Any objection to the blueprint?

Mr. Kearney: We haven't had a chance to examine it or ask any cross questions about it.

The Court: Submit it to counsel.

Mr. McFarland: No, I am offering it for identification and then I want the witness to use it to explain his testimony.

Mr. Kearney:

Q. Mr. Fraser, did you make this yourself?

A. Did I make that myself?

Q. Yes sir.

A. No, I did not.

Q. Do you know when it was made?

A. It was made by one of the engineers of the construction plant, I think it says on it there.

Q. Don't you know when it was made?

A. I beg your pardon.

Q. Don't you know when?

A. It was last year, I think, 1914. You will see when.

Q. That don't matter, any date that is on there. You can put any date on that. Do you know when this was made.

A. I know when they were installed.

Q. When they were installed?

A. When the hoppers were installed.

Q. I say, do you know when this map was made?

Mr. McFarland:

Q. Do you know when it was made?

A. Well, I don't know just exactly when that was made, since the smelter has been running.

Mr. Kearney: Well, bring it over here.

The Witness: It gives the date on it when it was made.

Q. What?

A. It gives the date on it when it was made.

Q. No matter about that date, but don't you know of your own knowledge?

A. Don't I know what?

Q. Don't you know when it was made?

A. I can't give the day when it was made.

Q. Did you have anything to do with making it?

A. Did I have anything to do with it?

Q. Yes sir.

A. No, I did not.

Q. Did you yourself take the measurements for making it?

A. I did—no, not for making that; I did not.

Q. Did you ever check up all the figures on this map?

A. Part of them I have.

Q. Part of them?

A. Yes.

Q. Then of your own knowledge, your own personal knowledge, you don't know that this map is an absolute correct map.

A. According to the part that I recollect here—that we are here to refer upon.

141 Mr. Kearney: Well, we object to it. I don't think it is sufficiently established.

The Court: What is the objection.

Mr. Kearney: We object to its introduction in evidence. We do not think it is sufficiently proven that it is correct. He testifies that he did not make it himself. It was made by another person and he never checked up the figures on this and it is not one that was made under his supervision. He did not make it himself. Another person made it.

The Court: Objection sustained.

Mr. McFarland: If the Court please, I think the witness testified that so far as the parts in which that map are relevant to the issues in this case are concerned, that it is correct, that he checked it up.

The Court: Well, you cannot introduce a map that is identified in that way.

Mr. McFarland: Well, I will ask him just a few questions.

Q. In respect to the hoppers as shown by this blueprint, is it correct—does it show a correct reproduction of those hoppers?

A. It does.

Mr. Kearney: I object to that as a leading question.

The Court: When an objection is made, just wait until the court passes on it.

Mr. Kearney: We move to have the answer stricken out.

The Court: The map may be used as illustrating the testimony of this witness, but it is not admitted as an accurate and correct representation of the situation as it existed at the plant in question at the time in question. It has not been shown that this witness made the map, or saw it made, or knows that all the measurements thereon are correct, and for that reason the objection is well taken—is sustained.

Mr. McFarland: If the Court will permit me, I offer this map in evidence for the purpose of showing that the position of the hoppers as shown by this map is correct; also for the purpose of showing that the two lines of broad-gauge railway as shown by this map are correct, and for the purpose of showing the lines of railway—sixteen-inch gauge railway as shown by this map are correct, and for the purpose of showing the track of this broad gauge—both of the broad-gauge railways from the point where the calcine was obtained to and across the floor of the feed-floor of the smelter. And I further avow that if those questions were permitted to be asked of the witness, that he would so testify.

The Court: Any objection to that offer?

Mr. Kearney: I object. It isn't sufficiently established.

The Court: Objection sustained.

142 Mr. McFarland: Note our exception.

Q. Now, you can take this map for the purpose of illustrating



your testimony. Now, are there any lines of railway on what is known as the feed-floor of the smelter?

A. The two standard gauge-railroad lines and a twenty inch railroad called the fettling track.

Q. Is that shown by that diagram that you have?

A. Yes, it is shown, part on this one, and part on another diagram I have here.

The Court: Is the engineer that made that present.

Mr. McFarland: No sir, I don't think so. It was made before the smelter was constructed, and it was constructed on the plans set forth on that diagram.

The Court: Go ahead.

Mr. McFarland:

Q. Will you mark by some appropriate figure where those lines of railway, both broad-gauge and the narrow-gauge, are?

A. The two standard.

Q. That won't do. Take a pencil or pen, and by some means of identification just put something, "A" or "B" or "C" or "D."

The Court: It may be marked for identification. I thought it had been marked for identification.

Mr. McFarland: So as to identify on that particular map where the particular object inquired about is.

The Court: Very well, mark it.

A. There is the broad-gauge here.

Mr. McFarland:

Q. Now, mark that "A."

A. This is a space between.

Q. Mark it all "A."

A. This is a space between the tracks.

Q. There is a bin there, isn't there?

A. Yes, there are fettlings.

Q. Now, mark, if you will, "B", where the narrow gauge is.

A. It is on this other plat.

Q. On this one?

A. No, it is this one, this is it here.

Q. Mark that "B".

A. This is the fettling track.

Q. Narrow gauge?

A. Yes.

Q. Now, are there any fettling bins or hoppers on that floor?

A. Well, there are six. There are six small fettling bins on that feed-floor to each furnace.

Q. Will you mark on that blueprint which you are using to illustrate your testimony with, the letter "C" where those fettling bins are.

A. Well, the same as what I have marked already "A."

Q. They are the same?

A. The ones that are marked "A" are the fettling bins.

Q. How do those lines, the railway lines running on that map,—how do they run?

A. The broad-gauge runs across the fettling bins and the twenty-inch runs parallel with them.

143 Q. Parallel with it, or at right angles with it?

A. Parallel with the fettling—over the top of the fettling bins, but the broad-gauge runs across them.

Q. Now, are these furnaces fed by the car that goes over the narrow gauge?

A. Well, they are fed in a way. They are fettled. The narrow gauge is the fettling track. It runs the entire length of the furnace, each side of the furnace over the top of the brick walls, discharges crushed ore. The fettling is crushed ore from three-eighths to a quarter to three-quarters of an inch. The ore is crushed to that size, and this fettling car, push car, runs across on a twenty-inch gauge on top of the fettling bins and discharges this ore into these bins and runs down into the furnace and protects the brick wall.

Q. Now, does the car that travels the broad-gauge line, does that feed these hoppers with ore?

A. It dumps its ore into the center of the furnace.

Q. That is that?

A. That is the calcine car, it discharges into the center, into a hopper into the center of the furnace.

Q. Then I understand you that the narrow-gauge discharges ore—

A. Discharges crushed ore into the side walls, into the side of the furnace.

Q. And the broad-gauge cars discharges only calcine.

A. Calcine, limestone or slag, or whatever is required into the center of the furnace.

Q. What is the surface of this feed-floor covered with?

A. What is it covered with? It is covered with sheet iron.

Q. All over?

A. All over, quarter-inch sheet iron.

Q. Is there anything between this sheet iron and the rails on which these cars run?

A. Anything between the rails and the sheet iron?

Q. No, I mean up to the rails. What do the rails of the track rest on?

A. Well, the rest on thirty-inch I-beams.

Q. Thirty-inch I-beam?

A. The thirty-inch I-beam runs right from one end of the building to the other across the furnaces, across over the top of the first section of the furnaces.

Q. These cars run right along?

A. Right along over top of the furnaces.

Q. Run parallel with these I-beams?

A. Yes, with these I-beams. It shows on this drawing, the track and these I-beams, where they run over them.

Q. Did you say how deep those I-beams are?

A. Thirty-inches.

Q. From the top of the feed-floor to the bottom?

A. From the top to the bottom is thirty inches.

Q. Now, where are these fettling pots situated with reference to these I-beams?

A. The fettling hoppers?

Q. Yes.

A. They run between the tracks.

Q. Narrow-gauge or the broad-gauge?

A. The broad-gauge track.

Q. About what position in the track, center or side?

A. Well, there is three at each side of the furnace. The broad-gauge track runs right across the west side. There is one in between this broad-gauge track at each side of the furnace. Then  
144 there is a space of about four feet to the east side. There is one in between that. Then the east track, there is one also in between the tracks. It makes three on each side.

The Court: Isn't there somebody here that can make a map on the part of the company?

Mr. McFarland: We have got it right here.

The Witness: There is a sketch here from this draftsman here in town.

The Court: Who made it?

The Witness: Made by Hastings or Hoskins, or somebody down there.

The Court: Isn't there somebody here representing the company that can draw a map?

Mr. McFarland: Only that one, the one that it was constructed by.

The Court: Can this witness draw that; these hoppers and the things about which he has been testifying?

Mr. McFarland:

Q. Can you do it.

A. No, I am not a draftsman.

The Court: You don't have to be a draftsman. One that is drawn without a scale and approximately correct.

The Witness: Yes sir.

The Court: Well, that has not been identified as being correct.

The Witness: Here is one I suggested. Of course, it was just off this map here, to a draftsman. I suggested it on a larger scale. I wouldn't undertake to make one myself.

Mr. McFarland: Now, if your Honor please, this is the one that was used on the cross examination of Mr. Hammer, and is filed for identification, but not introduced in evidence, for the reason that it is not technically accurate.

The Court: Who made it?

The Witness: It was made at a suggestion of mine by this draftsman.

Mr. McFarland:

Q. Who made this?

A. This draftsman that lives—Hastings. He lives across from the postoffice.

Q. At whose direction did he make it?

A. From my instruction.

Q. Is it correct?

A. Yes, there is only one alteration to be made on it, and that is this hopper here. There is a little change in the width from that.

Q. In the width.

A. Question of distance of two inches.

145 The Court: Any objection? Submit it to counsel.

The Witness: It is just a sketch showing the tracks, you know.

Mr. Kearney:

Q. Mr. Fraser, does this show all three of the hopper?

A. What is that?

Q. Does this show all three of the furnaces?

A. It don't show the hopper.

Q. No, not all of them?

A. I can't hear what you say.

Q. It don't show all three of the furnaces.

A. It shows the only furnace on that we have reference to.

Q. Say, Mr. Fraser—

A. Yes.

Q. Did you stand over this man when he made it?

A. Right at the table when he made it.

Q. You did?

A. Yes, right at the table.

Q. You stood at the table. Did you tell him what to do exactly?

A. I told him what to do, yes.

Q. Make each figure and line?

A. Yes, make these lines without a map or anything. These maps just come last night.

Q. Why didn't you do it yourself then?

A. What is that?

Q. If you knew so much about it why didn't you do it yourself?

A. Well, he claims to be a draftsman. I don't claim to be a draftsman, and I wanted to put it down in form so you would understand it.

Q. Oh, you had my interest in view.

A. What?

Q. You were looking out for my interest.

A. Well, it was part for your interest.

The Court:

Q. It is correct, is it?

A. It is correct.

Q. Does it correct- represent the things purporting to be represented by it?

A. It was as near to my knowledge—only the hopper, the bottom of the hopper; I wasn't sure whether it was twenty-four inches from my own knowledge, or thirty inches; and that was the only objection I had to the hopper there. I did not know.

Mr. McFarland:

Q. Well, do you know it now? Do you know the exact dimensions?

A. Well, only I know it that that was thirty inches, because I noticed on this map here.

Q. That is, you have got it twenty-eight there.

A. I got it twenty-four, but I wasn't sure whether it was twenty-four, and I told this other gentleman that I did not—wasn't sure of the measurement.

Mr. Kearney:

Q. Is this a true representation of all the hoppers?

A. That is a true representation of the one, of the third one that we are figuring on. I went into the hopper and measured it myself, that one hopper where Mr. Hammer was burned.

Q. This don't show the relation then to the other hoppers at all.

A. No, it don't show nothing in regard to the other hoppers. They are all about the same. This plan here, the drawing, the original drawing, and the construction of the work shows that the hoppers there wasn't about half an inch of even, anyway. That was just a sketch from my own observation.

146 Q. Is there any hopper on that floor three feet square?

A. Any hopper on that floor three feet square?

Q. Yes sir.

A. The center hopper is three feet square, the center.

The Court: The question is have you any objection to the map itself, the sketch.

Mr. McFarland: As corrected.

Mr. Kearney: I object to its introduction.

The Court: Objection overruled.

Mr. McFarland: Now, if your Honor please, may we have leave to correct the "twenty-four" to "twenty-six"?

The Court: Yes. Just let him go over there at the table and make the corrections.

Mr. McFarland: The dimensions of the hopper.

The Witness: This is thirty inches. Instead of thirty inches here, that is thirty inches, and this from the bottom of the hopper to the top of the hopper is twenty-seven inches; to the floor is thirty inches. It is twenty-nine and one-fourth inches from the bottom of the hopper to the level of the floor.

Mr. McFarland:

Q. As shown by the diagram there of the hopper on that sketch—

A. Do you want me to explain it?

A. —are the dimensions of the hopper shown on the digram correct?

A. They are correct.

Q. Now, does the other portion of the liagram represent the conditions?

A. Well, this is to my own knowledge.

Q. That is all you can testify to, isn't it, you- own knowledge?

A. I dictated to the engineer. He had a little sketch on paper.

The Court: I understand it has been admitted in evidence.

Mr. McFarland: I will ask leave to have it marked Defendant's Exhibit 1.

Q. Now, does that diagram, Defendant's Exhibit 1—

The Witness: Your Honor, there is one other small change I would like to make there.

The Court: You had better make it before it is admitted in evidence. He says there is another small change that he desires to make.

The Witness: That makes that change from the opening to the edge of the hopper eight inches instead of six. That is from here to there. There makes it thirty inches across now. It was twenty-four inches before.

Mr. McFarland:

147 Q. Now, Mr. Fraser, I will get you to explain this, what you mean by these different things you have on this diagram. What does that represent?

A. This here is an end view of the hopper.

The Court: Now, Mr. McFarland, when you ask "what is that," the reporter cannot get it. He does not know what you are taking about.

Mr. McFarland: No, I beg your pardon, sir. Now, what is the representation on the diagram there marked "A," what is it intended to represent?

A. This is the end view of the fettling bin or hopper. We generally call it—some calls it a bin and others call it a hopper. I call it a hopper, generally. From here to the bottom is twenty-seven inches. In the two and one-half inch space from this point—

Q. Indicated by what?

A. Then there is two and one-half inches from the top of the charge hopper to the top of the floor—space that is open, and the space where Mr. Hammer was working at the time when he got burned.

Q. Now what is this?

A. That is the level of the floor, the line, the floor level here.

Q. What does this represent?

A. This represents the space of two and one-fourth inches from the top of the fettling bin to the top of the charge floor. There was a space—the charge hopper didn't come up to the floor.

Q. What do you mean by the projection from the bottom of this hopper, indicated by the letter "A" on this Exhibit 1?

A. This here is the pipe. Now, this is entirely over the side-walls of the reverberatory furnace. This runs parallel with the furnace along the side. This is a five-inch pipe. When the car discharges ore up here, then it runs down through the five-inch pipe and drops on the side-wall of the furnace for the purpose of protecting the brick walls. The fettling pipes—the ore goes down and covers entirely the brick walls over so that the flame, the heat don't smelt the brick. They attack the ore.

Q. Now what discharges that?

A. There is a twenty-inch push car that comes from the bins. This is that car here.

Q. What is discharged in there, and what by?

A. Well, the ore is discharged all the way from three-eighths of an inch to three-fourths of an inch. In fact, sometimes I have seen them have an inch and a half ore.

Q. What do you mean by that, the size of the ore?

A. Size of the ore, yes. That is dumped in from the car which runs parallel with this track, dumped in there, in this bin, and when we want to fettle there is a gate in here. They open it and let the ore drop into the furnace.

Q. By what is that discharged, the large car or the small one?

A. Small one.

Q. The twenty-inch gauge?

A. The twenty-inch gauge.

Q. Now, I see you have drawn something on this defendant's Exhibit 1, near the bottom of the exhibit indicated by the word, by the letter "B." What do you mean by that?

A. This here is supposed to be the small fettling car, which comes from the bins. The ore bins is along in here. It gets its load here, and a man pushes it along, along this track until he comes to the turntable. This is the turntable here.

Q. What is that indicated by, "C"?

A. This is the turntable. The car is pushed on here and then turned to a right-angle and pushed along on here to discharge  
148 its ore. These three openings here is the openings between the tracks, right over the first section of the furnace.

Q. Well, now, what is that indicated by on this plat?

A. Well, that is one, two, three hopper, I guess. I don't know what these figures are, but this is the hopper underneath the track. Also this one and this one, and this is the north side of the furnace. There is also a turntable there which goes along just the same.

Q. Indicated by the figure "6"?

A. Yes.

Q. "4", "5" and "6", is that right?

A. Yes.

Q. Now what does this indicate on this exhibit 1?

A. This is the broad-gauge track, the standard gauge track where the car, the calcine car comes in with its load.

Q. Indicated by what figures on that map?



A. By "7" and "8".

Q. Now, does that map show another broad-gauge track?

A. This is another broad-gauge track here, east, the east side, or the west side of that.

Q. It runs clear across?

A. It runs straight across. This is another broad-gauge track here.

Q. Indicated by what figures?

A. Indicated by "8" and "9." The number "2" here, or this space here, is the space between the two tracks.

Q. There is also a fettling bin under that?

A. There is a fettling bin at each side, yes, under that, the same as the others, the same as the other side.

Q. Now, on which one of these tracks was this car going on at the time of the accident, if you know?

Mr. Curley: I object to that. There is no showing there that Mr. Fraser knows anything about it.

The Witness: This.

Mr. McFarland: Never mind that one question. Do you know which of these tracks the calcine car was on when the calcine was discharged on Mr. Hammer?

A. On the west side.

Q. I say do you know that of your personal knowledge.

A. I know that is where Mr. Hammer got burned in that hopper on the west track.

Q. Which one?

A. It was on the west track.

Q. Indicated by what figure?

A. On the south side of the furnace.

Q. You mean this one or the one indicated by the figures "8" and "9"?

A. Yes.

Q. Now, do you know which one of the hoppers Mr. Hammer was in at the time of the accident, of your personal knowledge?

A. Yes, of my personal knowledge.

Q. The one indicated on the map by the figure "1"?

A. Yes.

Q. In the center of the map?

A. That is on the south side of the west track, the hopper on the south side of the west track.

Q. Now, Mr. Fraser, when this floor was originally constructed what were the sizes of the openings on the top of the feed-floor immediately above these fettling bins?

Mr. Curley: I object to that.

The Court: Read the question.

149 (Question read.)

Mr. Kearney: I object to that as immaterial.

The Court: Objection overruled.

A. Eight inches square.

Mr. McFarland:

Q. Were there any changes made in those openings later?

A. They were changed to twelve inches by thirty-six inches.

Q. Who did that?

A. Mr. Hammer on that furnace on this job.

Q. So that if I understand you correctly the openings above the fettling bins, or the hoppers, is one foot by thirty six inches now.

A. Twelve by thirty-six inches now.

Q. And that change was made by Mr. Hammer from eight by eight.

A. There was two holes eight inches by eight inches.

Q. So that the two holes have been enlarged?

A. Enlarged into one twelve inches broad by thirty-six inches long.

Q. And that was the situation at the time of this accident?

A. Mr. Hammer was doing that work.

Q. How far is the top of the hoppers below the surface of the feed-floor?

A. They were from two to two and one-fourth inches, the top of the hopper.

Q. That is, you mean the sheet iron covering of the feed-floor?

A. They were two and one-fourth inches from the top of the hopper to the top of the floor—a space.

Q. A space in there?

A. Of that much, two and one-fourth inches.

Q. How deep were those hoppers?

A. They were from the floor, from the level of the floor to the lowest part, thirty inches.

Q. How wide were those?

A. They were also thirty inches.

Q. Wide?

A. Wide, from the inside of the hopper, thirty inches.

A. Well, were they square at the bottom?

A. No, they were round at the bottom.

Q. Will you show that to the jury, the shape of them at the bottom, just show that to the jury, please.

A. This is the shape of the hopper at the bottom. It has a round bottom. First it comes down square and then curves about a half-circle there, so it was thirty inches from the extreme point here to the level of the floor, and thirty inches from the inside diameter to this side, thirty inches across in width.

Q. Now, when they went to repair the hoppers by placing angle irons from inside, they would have to go down through that twelve by thirty-six hole into the hopper.

Mr. Kearney: I object to that as a leading question.

Mr. McFarland:

Q. How would he have to get in there to place these angle irons from the inside?

150      The Witness: Is there any objection?  
            The Court: No.

A. Well, there are several ways of doing that.

Mr. McFarland:

Q. I know, but how would he have to do that to place them in there in the way he did? Now how did he do it?

A. Well, he crawled down through that twelve inch hole, twelve by thirty-six inch hole. That is the way I understand Mr. Hammer done that.

Q. Now, was there any other method of performing that duty than getting down in that hole?

A. Well, I would think there would have been another method of doing it.

Q. What is that?

A. I would have had that work done from the outside. If I had been doing it myself I would have done it from the outside.

Q. Then you would not have gone into the hopper at all?

A. No, not go into it. I would have sat with my feet in it, on the floor.

Q. Could you take measurements in that way?

A. Oh, yes.

Q. How were those angle irons fastened to the hopper?

A. Well, I tell you, there is an angle iron here. I could explain if you would allow it, and the court. If the gentleman at the door will bring in that angle iron I have there.

Q. What was the length of the angle irons that were being placed in the top of those hoppers?

A. The measurements of that hopper was forty-four inches and three quarters.

Q. On top?

A. Inside, and the hole between the—the space between the top of the hopper and the floor was two and one quarter inches. At the end of the hopper there is a three-inch angle iron extends the whole way around to the top of the hopper, so this angle iron, this would set in this form.

Mr. McFarland: Here, if your Honor please, I think it would be well for the record to show at this point of his testimony that the witness is using an angle iron to illustrate his testimony.

Q. Now, what are the dimensions of that angle iron?

The Court: I suppose the reporter's notes will show that.

A. This angle iron is three inches, three by three by a quarter.

Q. What is the length of it?

A. It is forty-four inches and three quarters, the identical length as what was used in the hoppers.

Q. That length?

A. The space here indicates the three inch angle iron that was on the circular, on the end of the hoppers. It fits like so, against the inside of the hopper. The part here which kept in place was from

a bolt through this opening here, through the floor, and held in position so it could not move. These three bolts bolted up through the floor.

Q. What were those that you were speaking about that were in the fettling bin before you undertook to put these on?

A. This was put on to fill up the space, the two and one-quarter inch space.

151 Q. What was the purpose of that, do you know?

A. What?

Q. What was the purpose of putting those angle irons in there?

A. Well, the purpose of putting those angle irons was to keep the ore from falling over down onto the workmen underneath. When the man above filled the bins full up some little pieces overflowed and would come down and drop onto a man's head. Then, another, the greatest obstacle was it overflowed onto the top of the furnace, onto the top of the brick roof, and covered the brick roof about thirty inches, and then that kept the cold ore away from the bricks and smelted the bricks. They had to continually clean the rock off of the top of the roof so it was for that reason they put these on for to cover up that space.

Q. That space was two and one-half inches?

A. Two and one-fourth inches. This space here is where the angle irons was on the end. The angle iron where the sheet iron was riveted to.

Q. To make the box?

A. This three inch angle iron, the angle iron came over the space and completely covered the space, the whole of it.

Q. Now, you say you had placed angle irons similar to this?

A. It was identically the same as this angle iron that was used on these hoppers.

Q. I didn't understand you.

A. It was the same measurement. It might have been an eight-of an inch, or a little difference from this angle iron. This was the class of angle iron, three inches by three inches by a quarter.

Q. Answer this question. Had you performed a similar service in placing angle irons on any of those fettling tanks before?

A. The number 3 furnace had all been fixed before.

Q. By whom?

A. By, I think it was—I am not exactly sure who the man was, but I think it was Morris, another repairman.

Q. Under your direction?

A. Under me, yes.

Q. Well, how did he put them on?

A. He put them on from the outside.

Mr. Kearney: I object to that as immaterial.

Mr. Curley: Unless this witness can show that he knows of his own personal knowledge, and that this isn't hearsay.

Mr. McFarland:

Q. Well, how about that?

A. This man was on the job putting these things on. I couldn't

exactly swear that I stood over him and looked at him putting them on, but he done the work.

Mr. Curley:

Q. Do you know of your own personal knowledge how he did it?

A. Well, he never crawled inside of them because he couldn't. Those hoppers were filled with ore. He couldn't crawl in.

Q. Did you see him of your own personal knowledge?

A. I saw him working on them.

The Court: Objection overruled.

152 Mr. McFarland:

Q. What was he doing; how was he doing it?

A. Well, he was just working around there. Of course, I never saw him put the angle iron in, but he was on the job.

Q. I know, but what position was he in when you saw him?

Mr. Curley: I object to that because the witness did not see him when he put the angle iron in.

The Court: No, if he says he did not see him put them in, he cannot give his opinion.

Mr. McFarland:

Q. Did you see him at any time when he was discharging his duty in putting on those irons?

A. I saw him when he was working on that furnace doing that work.

Q. What was he doing then; what was he doing when you saw him?

A. Well, that is the work he was doing. He was putting these—

Q. How was he doing it?

Mr. Curley: I object to that. He has already testified that he did not see him when he was putting the angle irons in, that he was on the job.

Mr. McFarland: If the Court please—

Mr. Curley: No, I object to that going to the jury.

Mr. McFarland: I am asking him if he knows. If he knows he certainly has a right to tell it.

Q. You say you saw him when he was doing that?

A. The man done that work because he was employed to do that job. Of course, I never saw him.

The Court:

Q. How do you know? The only reason you know that he did it is the one you have just given?

A. That is the only reason.

The Court: I sustain the objection.

The Witness: I cannot say that I saw the man inside putting the iron in. I cannot say that.

Mr. McFarland:

Q. Was there anything in this hopper at the time that man was placing the angle irons on those hoppers?

A. This man, Morris, was employed on that job fixing up these hoppers, filling up that space, and he done it, and he did not do it from the inside. He done it from the outside.

Mr. Curley: I ask that that be stricken out as not responsive to the question.

The Court: Objection overruled.

Mr. McFarland: That is a question of cross examination.

Q. How do you know?

— Well, because he couldn't get into the hoppers.

Q. Why?

A. Because that furnace was running.

Q. It was hot?

153 A. It was hot. It was smelting ore at the time and he couldn't get in.

Q. And he fixed it while it was hot; it was fixed up, the holes were covered up?

A. While that furnace was running.

Q. Was it filled up to any extent with anything?

A. Filled up to the top mostly all the time.

Q. With what?

A. With ore.

Q. Now do I understand you to say in that situation that this party put those angle irons on that hopper with that hopper filled up practically to the top with ore?

A. At times, you know. The hopper would not be filled up to the top entirely all the time. They discharged, you see.

Q. Go ahead.

A. They discharged their ore. When they emptied their hoppers a little bit, they dropped it down. When they wanted to work at one hopper they would let the ore go enough into the furnace to let them lie down and take their measurements, cut their angle iron and put it up.

Q. From what position?

A. From kneeling down and looking into the hole.

Q. Now, I understand you to say that one could not get into that hopper under any circumstances at the time he was placing those angle irons on Hopper Number 3?

A. No, the furnace was running, and he could not even if the hopper was empty. It is red-hot from the heat, the gas off the furnace makes these hoppers so hot that a man cannot touch them with his naked hands.

Q. How did he do that?

A. He done that, he leaned over and took his measurements of his angle irons and the end of the——

The Court:

Q. Where did he do that?

A. Off the floor. These bolt on the floor, you see. They bolt up through the floor. The space between the inside of the hopper and the hole they had to go down is ten inches. It is only this distance from here to the hole. It is not like it was so far that a man could not reach his hand in and measure anything.

Mr. McFarland:

Q. Now, you say this opening on the top was twelve by thirty-six?

A. It is twelve inches by thirty-six inches.

Q. Now, how far was it from the opening to the side where these angle irons were being fitted up?

A. One side is ten inches and the other side is eight inches from the edge of the hole.

Q. Now, can the angle irons be fitted from there?

A. If I was doing the job I would fit it that way myself. It is no trouble for a man to reach his hand in ten inches and hold a little angle iron that way up there and put a bolt through the floor. The way I would have done the thing would have been to take the measurements?

Q. Well, now, let me ask you this question: How did you start this thing, by boring holes through the surface of the floor, three holes; how do you do that; how do you start?

A. I don't know what way Mr. Hammer done in the boring of the holes.

Q. How would it be possible to do it?

A. If you want me to tell you how I would do it, I could tell you that.

Q. Well, tell us that.

A. The space where Mr. Hammer went in is twelve inches by twenty-three inches.

154 Q. Thirty-six?

A. By thirty-six inches, twelve inches by thirty-six inches, and the hopper under that is forty-four and three fourths inches by thirty inches broad and thirty inches deep. Now the way, as I understand, Mr. Hammer done that work, he crawled into that, and to put that angle iron on he would have to turn around and lay on his back and take the measurements on holding that angle iron up, which is a very awkward and disagreeable position for a man to be in, compared to the size of the hole and the size of Mr. Hammer. Now, the proper way I would have done that, I would have taken the measurement of the hole, the edge of the hole and the inside measurement of the hopper, which was ten inches. I would have allowed one inch for the thickness of your iron and your bolt, I would have punched these three holes nine inches from the edge of the sheet iron, the holes, and then, I would have put my angle iron up there and marked from the surface. To put the bolts in all you have got to do is sit on the floor with your feet in there and hold the iron up like that, (illustrating) with one hand and put the bolts up through with the other. That is the way I would have done the thing.



Q. Well, is there someone on the top or the surface, if that had been done, to assist in bolting these irons onto the floor?

A. There was the helper.

Juror Moore: Can you hold that angle iron up with one hand?

A. Yes, you could hold that up with one hand or two hands. You see, the helper was assisting you there. That is only twenty-two pounds—hold it up. I think that would have been the most practical way to have done the job.

Mr. McFarland:

Q. Would there have been any danger in placing these angle irons by that method?

A. Any danger?

Q. Yes.

A. Oh, not the only danger is—

Q. I mean to his person, to Mr. Hammer's person.

A. I don't know the danger attached to it any further than—it was not such an awkward position to be in.

Q. So I understand you that there are two methods then by which this thing could have been done.

A. That is the way I would have done it, from the surface.

Q. Do you personally know of anyone having done it in that way?

A. Well, I don't know, the man that finished the hole up where Mr. Hammer was hurt—that was done from the surface, I think, afterwards. Of course, I can't swear to it. I can't say anything about it.

Q. Only just testify to what you know.

A. Yes.

Q. Considering the fact that the broad-gauge track there was being continually traversed by the fettling car, the calcine car—

A. It was traveled by a calcine car.

Q. —calcine car, and the fact that if he had been on the top of the floor instead of in that hopper—

A. Well, if he had been on the top of the floor, of course he would have seen the car coming, and could have got out of the way.

155 —which would you consider the safer way?

A. Oh, on the surface; the way I have just suggested is the safer way.

Q. It would not have been possible, would it, for him to have been burned by this calcine in the manner he was burned if he had been out on the floor?

A. No.

Mr. Curley: I object to it as being a leading question.

The Court: Well, it was answered before the objection was made.

Mr. McFarland:

Q. You don't know about any directions being given to Mr. Hammer as to how he should perform this particular work?

Mr. Curley: Of his own personal knowledge.

A. Nothing only what Mr. Nielson told me that he——

Mr. Curley: Never mind.

Mr. McFarland: Never mind what anybody told you; just what you know yourself.

A. No, no further than that.

Q. Had there ever been an accident on that floor that you know of.

A. Not that I know of.

Mr. Kearney: I object to that as not being material.

The Court: He says not as he knows of.

Mr. Kearney: How does that become material.

The Court: Well, you did not object until after it was answered.

Mr. Kearney: Well, he usually begins before the question is finished.

Mr. McFarland: Well, counsel asked him on cross examination if there——

The Court: I think that is immaterial anyway. I will sustain the objection to it. Now, Mr. Witness, when an objection is made do not answer the question because both sides are entitled to interpose their objection and entitled to a ruling before you answer the question.

Mr. McFarland: You weren't at the smelter the day of the accident?

A. No, I was not at the smelter there. I left about eleven o'clock and went to the old smelter.

Q. Who is smelter foreman now, and superintendent?

A. Mr. Flynn is the superintendent.

Q. Do you know where he is?

A. No, I don't know where he is. He was in California somewhere.

Q. When did he leave there, about the 11th of September?

Mr. Curley: I object to that as immaterial.

156 The Court: Objection overruled.

Mr. Curley: Asking when Mr. Flynn left there?

The Court: Yes.

Mr. McFarland:

Q. Was it about the 11th of September.

The Court: He may show that the witness, any witness, or any persons likely to be called as a witness, or who could have been called as a witness, has left the jurisdiction of the court.

A. It was in September sometime he left. I don't remember when in September he left.

Juror Pachó:

Q. What do you say these cuts are made on the end for?

A. On the end of the hopper there is a three-inch angle iron to stiffen it where the side sheets are riveted to the end, and the space between the top of this angle iron and the top of the floor is two

and one-quarter inches, so that left three-quarters of an inch it overlapped the hopper and extended over it three inches.

Mr. McFarland:

Q. Supposing that angle iron was placed, we will say, a quarter of an inch or half an inch, or a little further, one way or the other—

A. Well, that is the measurement.

Q. —would it make any difference?

A. Yes, it would make no difference, you know, the way it was. You know the ore is not like steam.

Q. Those ends don't have to fit perfectly?

A. No, they don't. It is not a neat job. It is just patching to keep the ore from falling. It is not like keeping in water or air or steam, or anything like that. It is just coarse ore, three-quarters, quarter inch and three-quarters and some times as high as an inch and a half ore is used in those things.

Q. Then they do fit pretty perfect?

A. Not perfect.

Q. Well, would half an inch be out of the way?

A. Yes, half an inch would be out of the way, but an eighth of an inch would not hurt anything.

Q. And the three holes—

A. That is where it is bolted onto the floor.

Q. I understand that. Are they made before it is put in under there?

A. Well, that depends on the man that is doing the work. That depends upon the system the man uses.

Q. Well, what I mean is this: do they have to make those holes in the angle iron before they make them in the floor?

A. Well, now, that is the point, the mechanical part. That is evidently the way Mr. Hammer done—put the holes in there first, and put the angle iron in here and put it up and marked the holes up from underneath.

Q. That is what I want to find out.

A. But I say, drill your holes first through the floor with them air machines, drilling machines—drill the holes in the floor first, and the Mexican helper, all he has got to do is hold the angle iron  
157 up there and he can mark his holes from the surface—take the angle iron to the machine shop and drill it and put your bolts in.

Q. Is the floor fixed so that you can do that?

A. Oh, yes.

Q. Drill the holes in the floor first before you do that?

A. Oh, yes, you can drill the holes any time in the floor. The floor is of sheet iron.

Mr. McFarland: Take the witness.

## Cross-examination.

By Mr. Kearney:

Q. Don't you know that you can get more correct markings by holding the iron up there and marking off the holes?

A. No, you can't get better marks.

Q. Say, Mr. Fraser, did you serve any time as a boiler-maker?

A. Have I served any time as a boiler-maker?

Q. Yes.

A. No, but I have been working all my life around the shop.

Q. You are very much interested in this case, aren't you?

A. What?

Q. You are very much interested in this case, aren't you?

A. Interested in this case?

Q. Yes sir.

A. Why, aren't you?

Q. I am asking the question, aren't you?

A. Yes, I am, certainly I am.

Q. You gathered up all the witnesses, didn't you and you gave them all money to come down here.

A. No, I didn't gather all the witnesses. You summoned the witnesses first and they come and told me you had summoned them.

Q. Didn't you furnish them the money?

A. I paid the fare. You told them to come to me and get money to pay their fare to come down here.

Q. You gave them the money.

A. What?

Q. Didn't you give them the money?

A. I bought their tickets for them and gave them the money to come down here.

Q. You have been keeping them together since they came down here.

A. I haven't been keeping them together. They go where they please. That is not so.

Q. You think you understand doing this work a whole lot better than Mr. Hammer, don't you?

A. Well, I don't see why I should not, in a general way. When I started the smelter there I had full charge of the repair of the machinery and the keeping it up in order—the old smelter for sixteen years or over. For several years I done every particle of the repair-work myself. It don't require a man to be a boiler-maker for to understand how to do repair-work.

Q. Now, you swear that the way that Mr. Hammer did this work was not the best way?

(Question read.)

A. Yes, I will swear to that.

Q. Do you swear that Mr. Hammer did this work in an incompetent manner?

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What way is a highly impracticable manner.

Q. Do you swear that the work that he did there was not skilled work?

A. Not steel work?

Q. Yes, sir.

A. No, I won't swear to that. It was steel work.

The Court: Skilled.

The Witness: Steel?

The Court: No, skilled.

The Witness: Skilled work. Oh, yes, yes, it was skilled work.

Mr. Kearney:

Q. You stated awhile ago a man there did something; you swore positively awhile ago that there was a man there that did some of this kind of work and he took the measurements from the outside?

A. He did, yes.

Q. And yet you state that you did not see him.

A. I did not see him put the angle irons in, but he done the job, he done the work.

Q. Say, Mr. Fraser, does it occur to you that you cannot swear positively about anything unless you know it of your own personal knowledge?

A. Well, you don't have to take it if you don't want it. You don't have to take the testimony if you don't want it.

Q. The jury is here to take your testimony, not me.

A. I say that man done the work. He is the man that done the work on that furnace. I did not see him put the angle irons in, but he finished the job, he finished up these holes in the hopper. He closed the opening, and he did not go inside; he couldn't.

Q. Out at this new smelter how many of these angle irons did you put on yourself?

A. I didn't put on any myself at all.

Q. Did they have any of these hoppers like that at the old smelter?

A. No, not the same size as that, but they had lots of hoppers in there, different shapes and form.

Q. They had different hoppers altogether?

A. Yes, altogether.

Q. So that these particular hoppers that were out there at the new smelter, you never had any experience with those until the new smelter was put up?

A. A man don't have to have any experience for it. His ideas, his particular knowledge, will show what is required. It don't make any difference what kind of hopper it is, if he is a mechanic, he knows what is required.

Q. So then you state to this jury that one hasn't got to have any experience in that particular line at all.

A. What do you say?

Q. It isn't necessary for a person to have any particular experience in one line, or any line, as long as he is a mechanic.

A. I say a man, even if he is not a boiler-maker, or he didn't

159 ever serve a trade, if he had good practical ideas, he can go and fix a thing, even if he is not a mechanic in that trade.

Q. Do you claim to have good practical ideas, Mr. Fraser?

A. I think I have,—just about on an average, I think.

Q. What is the name of this engineer you dictated this map to?

A. The map was sent to me from the Engineers, Horton & Jones.

Q. This map was sent to you. When did you get it?

A. Last night.

Q. This is the one you have been talking about there, penciled off?

A. This? That was yesterday. I think, or the day before yesterday. I am not sure—the day before yesterday.

Q. Did you have any of those blue-prints then with you?

A. No, no blue-prints at all. I had a piece of paper and sketched it off.

Q. What is his name, the engineer that made it here?

A. Well, I don't know his name, but I can tell you where his place is. His place is right across the street from the postoffice, the opposite side of the street from the postoffice, next door to the restaurant, I think they call him Hastings or Hoskins.

Juror Myer: Jaasted.

The Witness: Jaasted, that is it. Now, it was his man in there.

Mr. Kearney:

Q. Did Jaasted do that or somebody else?

A. He done it. Well, the man at the desk done it. I don't know whether they call him Jaasted or not. I couldn't say—the young man that is at the drawing table there.

Q. And you consider your skill far superior to Mr. Hammer's don't you?

A. No, I don't consider myself far superior at all, but I have got as good ideas in fixing things, probably, as Mr. Hammer has.

Q. You would like to fix this case?

A. No, I don't want to fix it. I am here to give my testimony. I will give the honest truth, and I won't swear to nothing that is a falsehood at all. I want to explain things as it is.

The Court: This line of questioning you will not be permitted to pursue any further.

Mr. Kearney: I beg your pardon.

The Court: Those sort of questions will not be permitted any further.

Mr. Kearney:

Q. You say that this man put those angle irons on there, on those hoppers when they were red hot?

A. I say the hopper was hot that he couldn't—almost red-hot; that he couldn't go into the Number Three furnace, that the angle irons was put on from the surface while the furnace was running.

Q. Those irons then extend up only about thirty inches?  
160 If it has a red-hot bottom, wouldn't the heat extend from the bottom?

A. They are not red-hot at the bottom at all. They are so hot you cannot put your naked hand upon them. They are not red-hot, but the smelting furnace is only something like, the roof of it, three feet below the bottom of these hoppers, and no man can stand in there on top of this roof but a very short time.

Q. What is to prevent the heat then from coming up on the side of those hoppers?

A. The hopper is entirely clear.

Q. To where you would have to put those angle irons in.

A. The hopper sets three feet over the top of it, and is independent of the roof of the furnace altogether. Outside of the fettling pipe which goes down through.

Q. Didn't you say that when they were putting those angle irons in, that those hoppers had calcine in them?

A. No, I didn't.

Q. You said they had been running calcine into them.

A. Not, those hoppers, no.

Q. Well, the hopper in which you say—that you know that he fixed.

A. Oh, yes.

Q. Now, not the one Mr. Hammer was fixing; but the one this person, you say you know he fixed it from the outside.

A. I don't think I said calcine. I said ore, crushed ore from three-eighths to three-quarters and sometimes one inch and a half was put in these hoppers.

Q. Was that one hot?

A. It gets hot from the heat off of the furnace.

A. The furnace underneath kept it hot?

A. What?

Q. The furnace underneath kept it hot?

A. Yes, the furnace underneath keeps it hot. It is impossible for a man to go in there and put an angle iron on there, or any other kind of a piece of iron. He can't touch the hopper with his naked hand.

Q. Now, you weren't present when Mr. Hammer was burned, were you?

A. What is that?

Q. You weren't present when Mr. Hammer was burned, were you?

A. No, I wasn't present at that time. I left the new smelter about eleven o'clock and went to the old smelter.

Q. You said awhile ago that you knew the hopper he was burned in.

A. I do know the hopper he was burned in.

Q. And you said awhile ago that he was burned in a certain hopper. Isn't it a fact that you got that information afterwards?

A. I saw the hopper. I came back about two o'clock. I walked back there about two o'clock after I was through at the old smelter, and Mr. Hammer had been taken to the hospital, and I went down and went in and looked at it, measured the distance right there at that time.

Q. You didn't see him burned?



A. No, I didn't see him burned at all, I went to the hospital and inquired for him two days after, or the second day after he was burned.

Mr. Kearney: That is all.

Redirect examination.

By Mr. McFarland:

161 Q. Do I understand you that this hopper in which Mr. Hammer was injured was not fed by the calcine motor?

A. It was empty, that hopper was. That furnace was shut down. That furnace was shut down—not in operation at all.

Q. Oh, shut down; it wasn't in operation?

A. No.

Q. Well, you say that hopper is fed by ore, is that right?

A. Well, yes, that hopper is fed by the ore from the twenty-inch track.

Q. Do you pour that calcine into the same hopper?

A. There wasn't poured anything in it.

Q. Where did you put the calcine in?

— Well, that is probably on the other furnace.

Q. On another furnace?

A. Yes, on the Number 3 furnace. They are now, or was before they shut down, using the calcine in these hoppers.

Q. So they use both calcine—

A. Yes, they are now.

Q. —and ore?

A. But at that time they were using the ore.

Q. At the time that Mr. Hammer was injured what did they feed these hoppers with?

A. Well, they fed them with ore, slag.

Q. Ore and slag?

A. The number 3 furnace.

Q. Did they pour calcine in that furnace?

A. Well, sometimes they done it. When they wanted calcine, according to the flux on the Number 3 furnace. Whenever they wanted—if they wanted calcine, they probably used a little of it. I am not familiar with the charging, as I have nothing to do in regards to the operation of the furnaces.

Mr. McFarland: That is all.

The Court:

Q. Well, at the time that those angle bars were put in these other hoppers, what was being put into those hoppers, the ore or the calcine?

A. Well, there was ore and slag, and I think probably there was some calcine. I am not sure of it. I wouldn't like to swear to the calcine, but I know there was ore and slag put into them at that time.

Q. And these angle bars were put in those hoppers between times?

A. Right at the time whenever the repair-man wanted to fix one, they would drop the ore down a little bit, enough for to let him reach in to take his measurements, and put his angle irons on.

The Court: That is all.

Mr. McFarland:

Q. That furnace under the particular hopper that Mr. Hammer was injured in was not in operation that day?

A. No, it had been shut down.

Q. It was what they call "dead"?

A. Dead furnace, yes.

Mr. McFarland: That is all, I think.

(Witness excused.)

162 MAURO PROVENCIO called as a witness on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. McFarland:

Q. Give you- name to the Reporter. Tell him your name.

A. Mauro Provencio. I want an interpreter.

Mr. Kearney: No, this fellow writes and reads English well.

Mr. McFarland: Yes, born and raised in this country.

Mr. Curley: We want to talk to him in English.

The Court: Well, we will try you in English.

The Witness: Well, I can't talk in English and I have never been before in this court business. I can't explain.

The Court: What did you say?

The Witness: Well, I say, I can't—I have never been in this court business; I can't explain.

The Court: Well, there are lots of people that never had any court business, and I wish there were a great many more, but that isn't the question. Now, if you don't understand any question that comes up, you let me know, and I will have an interpreter for you. But as long as you can understand the questions that are asked you, you may answer them in English. And I shall ask counsel on both sides to ask short questions—as many of them as you please, but short. If you cannot answer them in English, you let me know, and I will try to save you any embarrassment. It takes just twice as long to examine through an interpreter. Now, if you desire you may sit closer to this witness.

Mr. McFarland:

Q. Where do you live?

A. Clifton.

Q. How long have you lived in Clifton?

A. Oh, for about eight or ten years.

Q. Where were you born?

A. In El Paso, Texas.

Q. What is your business?

A. Laborer.

Q. Were you at work on the feed-floor—

A. Yes sir.

Q. Just wait until I get my question finished, then you can answer it. Were you at work on the feed-floor of the smelter at Clifton on or about the 28th day of December, of this year?

A. Yes sir.

Q. Will be a year this coming December. What were you doing.

A. I was fixing the feed-floor.

Q. Fixing what?

A. Feed-floor.

Q. And what was your particular duty on that feed-floor, if there was any duty that you were discharging?

Mr. McFarland: If your Honor please, I will withdraw that question.

Q. What were you doing up on the feed-floor at that date?

A. Just putting an angle iron in the hoppers.

163 Q. You were helping Mr. Hammer, you say?

A. Yes, sir.

Q. Doing what?

A. Putting in angle iron.

Q. Do you remember the time Mr. Hammer was hurt?

A. Yes sir.

Q. You know about the time of day?

A. Yes sir.

Q. What time of day was it, if you remember, before noon or afternoon?

A. Oh, afternoon.

Q. After twelve o'clock?

A. Yes sir.

Q. About what time after twelve?

A. Oh, it was about two o'clock.

Q. Did you see a calcine car come up onto the feed-floor about that time?

A. Yes sir.

Q. Who had charge of that car?

A. Estanislado Provencio.

Q. You know the hopper that Mr. Hammer was in, didn't you, fixing?

A. Yes sir.

Q. How far did that car—or did that car stop at that time before it reached the hopper in which Mr. Hammer was at work? Did it come to a stop?

A. How?

Q. Did it come to a stop?

A. About—

Q. Did it, first, yes or no.

A. Yes, he stopped.

Q. About how far was it from the hopper when the car stopped?

A. About twenty or twenty-five foot.

Q. Who stopped it?

A. The motorman.

Q. The motorman or the man that had charge of it?

A. Yes sir.

Q. Well, when he stopped at about twenty or twenty-five feet from the hopper at which Mr. Hammer was at work, what did you do, if anything?

A. Why, I told Mr. Hammer that the motor was coming the way we were working.

Q. Did you tell him anything else? Told him that the car was coming?

A. Yes sir.

Q. Where were you when the car stopped?

A. I was in the middle of the track.

Q. Middle of the track that the car was coming on?

A. Yes sir.

Q. Now, what did you do when the car stopped? Just state to the jury here what you did and what you said, and how you said it.

A. When the car stopped I tell Mr. Hammer the car coming over, and I tell him to get out.

Q. Did you go up to the hopper that he was in?

A. No, sir.

Q. How far were you from the hopper at that time?

A. From the hopper? Oh, just close to the hopper.

Q. Right by it?

A. Yes sir.

Q. What did you say to Mr. Hammer?

A. To get out.

A. Get out?

A. Yes sir.

Q. Now, do I understand you that you told him that the car was coming, or had come? What did you say now exactly; what did you say to him first, so that the jury can fully understand it. That is what I am after. You say you were standing in the middle of the track when the car came up and stopped?

A. Yes sir.

Q. And you were standing by the hopper that Mr. Hammer was in?

A. No, I never standing—

Q. Well, where were you?

A. I was in the middle of the track.

Q. How far from Mr. Hammer?

A. Oh, just close to the hopper.

164 Q. One, two, three or four feet?

A. Oh, about a foot, I guess.

Q. A foot?

A. Yes.

Q. One foot from the hopper?

A. Yes.

Q. Now, where was Mr. Hammer at that time?

A. He was in the hopper.

Q. Was his body and his head entirely—was it out of sight?

A. No sir.

Q. What part could you see?

A. Well (indicating).

Q. See him?

A. Yes.

Q. Was his head up to the top of the floor?

A. No sir.

Q. How far did it lack from being up to the top of the floor?

A. Just—

Q. One inch or two inches, or three inches, or what—a foot, three inches or what?

A. No sir.

Q. Can you tell the jury approximately the distance? Tell the jury about how far his head was from the top of the feed-floor.

A. No, he never showed his body on top of that.

Q. What?

A. No, he never showed his body on top of that hopper.

Q. His head was up?

A. No, it is was down.

Q. How far?

A. About two or three inches, I guess.

Q. What?

A. About two or three inches, I guess.

Q. I understand you now, the first thing you said you told him that the car had come. Did you tell him anything about the car stopping?

A. What?

Q. Did you tell him that the car was there and stopping?

A. No, sir, I never told him.

Q. What did you say to him then, that the car had come?

A. Yes sir.

Q. Then what did you tell him after than?

A. What?

Q. What did you say after you told him that the car had come?

A. After the car come?

Q. Yes.

A. Well, I told him to get out.

Q. What did he say?

A. He didn't want to.

The Court:

Q. What?

A. I told him two or three times.

Mr. McFarland:

Q. What two or three times?

A. Told him to get out.

Q. You told him that?

A. Yes sir.

Q. Well, then, what did you say?

A. No sir. Nobody what——

Q. Did he say anything when you told him to get out two or three times?

A. He don't want to get out.

Q. He said he didn't want to?

A. Yes sir; he get mad about it. He says, "That fellow is—" "Well," he says, "That fellow is coming over and don't let a man work," and he get mad about it.

Q. Who did he mean, the motorman of the car?

A. What?

Q. You said he got mad about the car coming. I want you to tell the jury what he said.

The Court: I think the reporter got what he said.

(Answer read.)

Mr. McFarland:

165 Q. Well, now, was it your duty to signal this car to come whenever you wanted it to come?

Mr. Curley: I object to that as calling for a conclusion.

The Court: I don't know, if he is employed in a certain line of work——

Mr. Curley: Well, we are willing that he show if he received any particular instructions. Now when he says, "was it your duty," he might have drawn an erroneous conclusion from his instructions.

Mr. McFarland:

Q. Was it your duty when the car approached the point where Mr. Hammer was working——

The Court: That is the question they objected to. They don't object to your showing what he was instructed to do.

Mr. McFarland: I will withdraw that.

Q. What were you to do up there on top of that feed-floor?

A. What did I do?

Q. Yes, why did you stand up there?

A. Well, I stand there to work and watch that car.

Q. Is that what you were hired for, and up there to watch that car?

A. Yes sir.

Q. Is that what you say you were doing that day?

A. When the car come—I can't understand it, you had better put an interpreter. I can't understand it good.

Q. I think we are getting along pretty well. Did Mr. Hammer say anything to you about the car coming on toward the point where he was?

Mr. Kearney: I object to that as leading. I object to putting in the witness's mouth what he wants him to testify.

Mr. McFarland: No, I didn't put it in his mouth. I asked if Mr. Hammer said anything about coming on or stopping the car. That is calling his attention to it in order to save time.

The Court: I am inclined to think that this witness had better have an interpreter, and let him tell all that took place.

(The testimony from this point was elicited through an interpreter.)

Now ask the general question and let him go ahead and tell all that took place here at that time.

Mr. McFarland: From the beginning, your Honor, or from where he left off.

The Court: From where he left off.

Mr. McFarland:

Q. Well, what did you do or say, or what did Mr. Hammer do or say after you notified him that the car was there, or was coming, or whatever you did say about the car?

166 A. I told him that the car was approaching.

Q. Did the car stop?

A. It did.

Q. You previously testified about twenty-five feet from him.

Mr. Curley: I object to that as repetition.

Mr. McFarland:

Q. All right. Did the car stop?

A. Yes.

The Court: He has answered that and he has given the distance.

Mr. McFarland:

Q. Then what, if anything, did you say to Mr. Hammer?

A. When the car stopped?

Q. Yes.

A. I told him that the car was waiting there to proceed, go across, or to go ahead.

Q. What do you mean by going across?

A. To go across to the other side where there was a deposit of some metals, and I don't know their names—slag or something like that.

Q. Do I understand you to say that you told Mr. Hammer that the car was waiting for him to get out of the hopper, to go across to some other point?

Mr. Kearney: I object to that question.

Mr. McFarland: I don't understand it, if you- Honor please, and I don't think this jury do.

The Court: Well, it seems to me it is very plain:



Mr. McFarland:

Q. Was that all he said?

A. Yes sir.

Q. Did you tell him to get out of the hopper?

Mr. Kearney: I object to that as a leading question.

The Court: Objection sustained.

Mr. McFarland:

Q. What did you say to him.

The Court: The object in bringing this interpreter forward was to allow him to answer the questions in his own way, without having to answer so many questions.

Mr. McFarland: I cannot understand what he was waiting for the car to proceed for, that the car was out there waiting to proceed.

The Court: Waiting for Mr. Hammer to get out of the hopper so that it could go over to the other side, is what he said.

A. Yes sir.

Mr. McFarland:

Q. Well, did he get out?

A. No sir.

Mr. McFarland:

Q. What did he say?

A. That he would remain inside.

Q. He would remain inside. Did he say anything to you about having the car come on?

Mr. Kearney: I object to that as a leading question.

167 The Court: Objection sustained.

Mr. McFarland: Did he say anything further?

A. No sir.

Q. Well, after he said that he wouldn't come out of the hopper, did you say anything further to him?

A. After I told him two or three times, after he told me two or three times that he wouldn't come out, then I jumped to the other side of the track and gave the motorman a signal to come on.

Q. Was there anything said by Mr. Hammer or by you at that time — reference to this car coming on?

Mr. Curley: Objected to as leading.

Mr. McFarland: I want to identify it as far as I can, to save time.

Mr. Curley: He has already gone over that.

The Court: I thought you had passed over that point and gotten to the point where the car *has* gone over. I thought he testified to that in English.

Mr. McFarland: Well, I was going to get that in the way indicated by your Honor.

The Court: Well, I did not mean to go over the whole thing again.

Mr. McFarland:

Q. Did the car start from where it stopped?

A. When I made a motion it did.

Q. Did it go over that hopper?

A. Yes sir.

Q. And what occurred then?

A. When it passed by him, by the hole, the calcine fell on him.

Q. Now, when Mr. Hammer said to you that he wouldn't come out of the hopper, did I understand you to say that he got back into it so you couldn't see him at all?

Mr. Kearney: I object to that as a leading question. He didn't ask him a question.

The Court: I will permit that question. Read the question.

(Question read.)

A. Yes he stooped down.

Mr. McFarland:

Q. Was it before or after he got down into the hopper the last time that he told you to tell the motorman to come on?

Mr. Curley: I object to that.

Mr. Kearney: It is leading and suggestive.

Mr. Curley: And the witness did not testify that he told the motorman to come. There is no such testimony as that.

168 Mr. McFarland:

Q. Did Mr. Hammer tell you to give the sign for him to come on?

Mr. Curley: I object to that question now.

The Court: Wait just a moment. The questions are coming so fast here now. In the first place, you withdraw the question that the objection was made to, do you not, or do you ask another one without withdrawing it? I did not understand you. You asked a question and an objection was made. Now before I had a chance to rule on it you asked another question. Did you withdraw the previous question?

Mr. McFarland: Yes sir.

The Court: What is the last question?

(Question read.)

Mr. Curley: That is objected to as leading and suggestive. He has asked him what else was said, what else did Mr. Hammer say, and the witness has said nothing; that Mr. Hammer said he had gotten tired of him running over there and that he wouldn't let him work.

The Court: He is not asking him to repeat that.

Mr. Curley: Then he asked him what else was said, and the witness said "nothing."

The Court: Yes, I understand, but apparently one or the other

of us don't understand the question. I do not understand it that way. As I understand it, he is now asking him to state whether or not he gave the sign for the man to come forward before or after Mr. Hammer made the statement that he wasn't going to get out.

Mr. Curley: I understood the question to be whether Mr. Hammer told him to make a signal for the man to come on.

The Court: I will sustain the objection because there was no testimony that he told him to come on.

Mr. McFarland:

Q. Did Mr. Hammer at any time tell you, or give you a signal, indicating that he wanted the car to proceed on its journey over the hopper in which he was at work?

Mr. Kearney: I object to that as leading and suggestive.

Mr. McFarland: If your Honor please, there is a difference between witnesses and parties. That might be an admission against interests—did he do it or did he not. He can say whether he did or not. If he were a party that would not be competent, but I ask him what this party said, or did he do it.

Mr. Curley: It is placing right in the witness's mouth the answer.

169 The Court: I will sustain the objection to it as too leading, and I will permit you to ask the witness whether or not he made any statement to the witness with reference to the car.

Mr. McFarland: Coming on?

The Court: Yes, coming on or going in.

Mr. McFarland:

Q. You know Mr. Hammer?

A. Yes, sir, I do.

Q. Did he make any statement or sign to you whereby he indicated that the car should proceed on to its destination and over the hopper in which he was?

Mr. Kearney: I object to that.

Mr. Curley: I think that is still leading.

Mr. McFarland: I think the question the court asked was perfectly proper, and I attempted to follow it as nearly as I could.

The Court: I think you repeated substantially your former question. I think I suggested that it would be proper to ask the witness to state whether or not Mr. Hammer said anything with reference to the car approaching or passing over the place, and if so, what it was.

Mr. McFarland: After it stopped?

The Court: Yes, and if so, to state what it was. Understand, I am not putting the question to the witness.

Mr. McFarland: I am putting it as counsel, if the Court please.

Mr. Curley: Speak up so that the jury can hear you?

A. Yes, he told me when he didn't want to come out of the hole.

Mr. McFarland:

Q. What did he say?

A. He told me that he would stay there, and for me to jump across the track and give the motorman a signal to come.

Q. Was the car standing still at that time?

A. When he told me to give the signal?

Q. Yes.

A. Yes, he was stopping.

Q. The car was stopping. Was there any other person present at that time except yourself, Mr. Hammer and the man who had charge of the calcine car?

A. Gustavo Provencio was working around there pushing a car, a hand-car.

Q. Pushing a hand-car?

A. A small ore car that runs on a narrow-gauge track.

Q. Anyone else that you saw or know that was around there?

A. No one else.

Q. What did you do, if anything, immediately after the calcine flowed onto Mr. Hammer.

170 A. Then he stood up straight in the place where he was working, and then I came there to help him.

Q. You came to him?

A. Yes sir.

Q. What did you do when you got there to him?

A. I just helped him to get out of the hole.

Q. Anything else?

— Then I took him a little farther out to help put the fire out.

Q. Did he help too?

A. Yes sir.

Q. Do you know Mr. Bentley?

A. Yes sir.

Q. Did you see him there?

A. I saw him after the accident and after we had taken Mr. Hammer out. They were working down below and they come up.

Q. Now tell the jury just who the people were that helped Mr. Hammer out of the hopper.

A. I was the only one. There was no one else.

Q. Did anybody afterwards come and help him?

A. After I had taken him out others come in.

Mr. McFarland: That is all. Take the witness.

Cross-examination.

By Mr. Kearney:

Q. Since this injury to Hammer where have you been?

A. In Clifton.

Q. The company never laid you off at any time, did it?

A. No sir.

Q. You worked on up to the 11th of September, the strike didn't you, and then you quit and left for Duncan?

A. No sir.

Q. Didn't you go to Duncan?

A. Before this strike I went to El Paso, Texas.

Q. What?

A. Before the strike, I went to El Paso, Texas.

Q. And you came back to Duncan, didn't you?

A. About two months afterwards I returned to Duncan, that is where I am now.

Q. And there the company is taking care of you, isn't it, furnishing your provisions? I mean the defendant here.

A. No sir.

Q. They don't furnish you any provisions at all?

A. No sir.

Q. After Mr. Hammer got injured didn't they promise to give you a better job?

A. No sir.

Q. Didn't they promise to give you a better job at all?

A. Before the accident I spoke to the foreman and I asked him to give me a better job, because I was not earning enough salary.

Q. Whose signature is this? (Handing paper to witness.)

A. It is mine.

Q. Don't you say in that letter that they promised to give you a better job and pay you more money?

A. Before the accident when I spoke to the foreman, and they didn't give me any better job before or after.

Q. Is this your handwriting?

A. Part of that is mine. This is my wife's handwriting and part of that is mine.

Q. Did you dictate that to her?

A. Yes sir.

Q. What does that say, the last part of that?

Mr. McFarland: If the Court please, I object to reading  
171 extracts from a letter. If it is important, it should be read in its entirety—not just pick out a sentence and read it.

The Court: Isn't it the entire letter he is asking about?

Mr. McFarland: No, he says, "what is that right there."

Mr. Kearney: He dictated it and I asked him to read it.

The Court: Well, if you want to object to it, you had better look and see what it is, and point out your objection.

Mr. McFarland: I would like to see it, your Honor, I have had no opportunity to look at it.

The Court: Counsel will no doubt submit it to you.

Mr. Kearney:

Q. You dictated this letter, didn't you?

A. Yes, I dictated it to my wife, and she wrote it, and I wrote another letter.

Q. This is your signature here to this letter?

A. Yes, that is my signature.

Mr. Kearney: We will ask that this be marked Plaintiff's Exhibit F for identification.

The Court: It may be marked.

Mr. McFarland: I have no objection to it, if your Honor please. We don't think it is pertinent.

The Court: Well, they haven't introduced it yet. As I understand it, they had it marked for identification.

Mr. Kearney: Now, we will offer it in evidence.

Mr. McFarland: No objection.

The Court: It may be marked.

(Paper marked Plaintiff's Exhibit F.)

The Court: You may read it.

(Counsel reads Plaintiff's Exhibit F to jury.)

Mr. Kearney:

Q. If the bottom valve in this car had been closed there was no danger in that car going over the hopper, was there?

A. I couldn't tell. I wasn't handling that.

Q. You don't know whether there was any danger about that car or not, do you?

A. How is that?

Q. You don't know whether there is any danger about handling that car or not.

A. To one who knows nothing about it, I think it is.

Q. You don't know anything about it then, do you?

A. No, I don't know anything about it because I never handle that car.

172 Q. How long were you about the smelter there?

A. I worked there about four or five years.

Q. Most every day did you see that car during that time?

A. Yes, the time I was working there, I saw the car.

Q. Did you ever see any red-hot silts in that car?

A. No sir.

Q. Did you ever see them pull the slide door at the bottom and the hot calcine run out?

A. No sir.

Q. You never at any time knew of calcine coming out of that car, did you?

A. No sir.

Q. And on this particular occasion you didn't see any calcine, did you, come out of that car, or know that it come out?

A. When it passed by the hole and fell on Mr. Hammer, I saw it.

Q. What?

A. When it passed by the hole on this occasion and fell on Mr. Hammer, I saw it.

Q. That is the first time you ever saw any hot calcine, isn't it?

A. Yes sir.

Q. Although you worked about that smelter about five or six years? And you saw that car most every day?

A. Yes sir.

Q. And that is the first time that you ever saw any hot calcine?

A. Yes sir.

Q. Did you ever see this car come down to those hoppers and discharge this calcine?

A. In that one where we were working, I have not.

Q. No, in the others?

A. In the others I could see the calcine in the deposits.

Q. Then you have frequently seen, or many times seen this car bring calcine to the other hoppers and dump it in them?

A. And the one that was running, I could see it come in.

Q. You saw it there didn't you?

A. I saw it several times.

Q. Well, you saw them dumping the hot calcine there, didn't you?

A. I could see it standing there probably unloading.

Q. Yes sir; you saw them unloading. Did you ever see this car at any time before spill calcine at a hopper or place that they did not intend for it to be emptied?

A. No sir.

Q. Did you ever tell anybody what you would or could testify to if called as a witness in this case?

A. No sir.

Q. Or knew about the case?

A. No sir.

Q. You never before told anyone what knew about this case?

A. No sir.

Q. After this accident happened didn't you go down and give Mr. Flynn a statement of what you saw and knew about it?

A. Yes sir, I did.

Q. Was that statement in writing?

A. Yes, I think it is, because they took my testimony there.

Q. And you signed it, didn't you?

A. No, I haven't signed it.

Q. You didn't sign it. They had a stenographer there and took down your testimony, didn't they?

A. Yes sir.

Q. Then they told you you would have a job right along didn't they?

A. No sir.

173 Q. Then they didn't promise to give you a better job and more wages?

A. No sir.

Q. That statement in the letter I just read then is untrue, is it?

A. It is. As I told you, that I spoke to the foreman before this accident that I wasn't receiving enough salary.

Q. Coming down on the train from Lordsburg to Tucson, didn't you talk to me about this case?

A. You spoke to me. I didn't speak to you.

Q. Didn't you talk to me?

A. Yes sir.

Q. And didn't you tell me that after the accident they promised you a better job?

A. I did not.



Q. You didn't make any such statement at all to me on the train, did you?

A. Yes, I did.

Q. Immediately following the injury to Mr. Hammer didn't Mr. Bentley say to you, "What is the matter with the fellow, (referring to the motorman) that he didn't stop the car?" Did not you then say to Mr. Bentley, "The brakes wouldn't work, the fellow said on the motor car," or words to that effect?

A. No sir.

Q. There was no such conversation or statement made or had immediately after the injury to Mr. Hammer, was there?

A. No sir.

Q. Nothing said at all about the injuries to Mr. Hammer, was there. There was nothing at all said about the injury to Mr. Hammer?

A. Some of them remained there talking perhaps, and I left to help take Mr. Hammer to the hospital.

Q. But you didn't hear anybody say anything at all, did you?

A. No sir.

Q. As soon as the car went over, they took Mr. Hammer out of the hopper, and nobody said anything, did they?

A. After the accident some of them got around and begin to talk how the accident happened?

Q. That was after they took Mr. Hammer out of the hopper, was it?

A. Yes sir.

Q. How long after?

A. Oh, about five or ten minutes.

Q. Did you see Mr. Bentley there at all?

A. Yes sir.

Q. Mr. Bentley was there and helped take Mr. Hammer out of the hopper?

A. No sir.

Q. Who were there that helped take him out of the hopper then?

A. I alone helped him to get out.

Q. Alone, eh? Nobody else?

A. No sir, nobody else.

Q. Nobody else came near him, did they?

A. Nobody else came until I had him on one side. Then the other men came in.

Q. Do you know this fellow that was driving the motor, or pulling the motor down? He is a relative of yours, isn't he?

A. Yes sir, I do.

Q. What relation is he to you?

A. He is first cousin.

Q. Don't you know, as a matter of fact, that he never did stop that car at any time; that he kept on going, and that you were requested there to give the signal to stop, and instead of doing that you gave the signal to come on?

A. No, he all the time saw, when we were working there—when

he saw us working there he would stop. He would work—he would stop just back of where we were working.

Q. I didn't ask you about other times; I asked you about this time.

A. If he stopped there?

174 Q. No, I am asking you if you did not motion for him to come on?

A. I did not give him any signal until Mr. Hammer told me to do so.

Q. No, I am asking you if you didn't motion for the motorman to come on.

A. No sir.

Q. You didn't motion for the motorman to go on at any time, did you?

A. After Mr. Hammer told me to jump across the track, I did.

Q. Did you give the motorman a signal to stop at any time just before Hammer was injured?

A. No sir.

Mr. Kearney: That is all.

The Court: Anything on re-direct examination?

Redirect examination.

By Mr. McFarland:

Q. You say you wrote that letter?

A. My wife wrote it.

Q. Did you dictate to her what to write?

A. Yes sir.

Q. Now what do you mean in this letter when you say that "Mr. Fraser wrote you a letter and told you to ask for expenses," expenses where?

A. Mr. Fraser wrote me a letter to go to their camp there in Duncan and speak to someone there whose name I don't know, to talk to him and to tell him—to talk to him in regard to my expenses of coming over here.

Q. To Tucson?

A. Yes sir.

Q. And what do you mean in this letter when you said if this money was not given you that you wouldn't go? Why was it that you wouldn't go?

A. Because I had nothing to leave there to my wife.

Q. Did you have any money on your own account to come?

A. Because I had nothing to leave there to my wife, *because I had nothing to leave there to my wife*. At the camp they only offered me the provisions.

Q. Did you have any money to come yourself to pay your own expenses?

A. To come here, no.

Q. Well, Mr. Fraser did give you some money to give to your wife, while you were gone?

A. No sir.

Q. Didn't give you any money at all?

A. No sir.

Q. Is your wife being taken care of there at the camp? Is she at the camp at Duncan?

A. Yes, she remained there at my father-in-law's.

Q. Well, don't you remember that Mr. Fraser gave you some money to take care of your wife while you were gone.

A. No sir.

Q. He didn't pay you any money at all?

A. No sir.

Q. Only brought you over here and is paying your expenses now?

A. Paying my expenses, and he told me he would pay me \$3 a day.

Q. While you were here?

A. Yes sir.

Mr. McFarland: That is all.

(Witness excused.)

175 GUSTAVO PROVENCIO called as a witness on behalf of the defendant herein, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. McFarland:

Q. What is your name?

A. Gustavo Provencio.

Q. Where do you live?

A. Clifton, Arizona.

Q. How long have you lived there?

A. I have been there ever since I was born, for all my life.

Q. Were you born there?

A. Yes sir.

Q. Born in Clifton. Were you there on the 28th day of December?

A. Yes sir.

Q. 1914?

A. Yes sir.

Q. What were you doing then?

A. I was on a fettling car that day.

Q. A fettling car?

A. Yes sir.

Q. Well, now, will you explain to this jury what a fettling car is?

A. Yes sir; it is a little car about four foot long, two foot and a half wide. It carries some kind of ore and slag on it, you know—a couple of wheels on the bottom.

Q. To do what with?

A. What?

Q. What is it used for, to carry ore and slag?

A. To carry ore and slag; yes sir.

Q. Where to?

A. To the furnaces and the hoppers.

Q. Were you engaged in that business on the day Mr. Hammer was injured, burned?

A. Yes sir; I was there.

Q. Was it your duty to be on that floor at that time?

A. No sir, it was not my duty. It was my duty to run the car on that day. I had my job done, you know, and I had a broom sweeping the floors there.

Q. Were you operating this little car that day?

A. No, not at the time of the accident.

Q. You say you were on top of the feed-floor?

A. Yes, sir; on top of the feed floor.

Q. What were you doing up there?

A. Sweeping the floor, sweeping the sides of the tracks.

Q. Sweeping?

A. Yes sir.

Q. Did you see the calcine car come up onto the floor, feed-floor, on that day about two o'clock?

A. Yes sir, I saw it.

Q. Where were you then?

A. I was on one side about ten feet distant from that hopper there.

Q. You were about ten feet from the hopper?

A. Yes sir.

Q. What hopper?

A. From the hopper that Mr. Hammer was injured in.

Q. And did that car come straight along from the time it entered the feed floor until it got to the hopper where Mr. Hammer was?

A. No sir the car stopped about twenty or twenty-five feet distant before the hopper, you know.

Q. Now, how long did that car stay there?

A. About five or ten minutes, I guess.

Q. Did you see this last witness Mauro Provencio?

A. Yes sir, I saw him.

Q. Where was he?

A. He was on one side of the hopper there.

176 Q. Was anyone else on that feed-floor in that immediate neighborhood then?

A. Nobody else but Mr. Hammer and the helper and the motor-man and myself.

Q. Three of you?

A. Four of us.

Q. Four of you including Mr. Hammer?

A. Yes sir.

Q. Now, what if anything, did the helper do when the car stopped?

A. I heard the helper speak to Mr. Hammer in there, but I couldn't hear what he said on account of the noises.

Q. He spoke to Mr. Hammer?

A. Yes sir.

Q. How far were you from Mr. Hammer at that time?

A. About ten feet at that time.

Q. Ten feet?

A. Yes sir.

Q. Could you see Mr. Hammer?

A. I could see his head; that is all.

Q. Was it up level?

A. Yes sir, it was level right there.

Q. Level with the top of the feed-floor?

A. On top of the feed-floor on the same floor.

Q. You didn't hear what he said?

A. I didn't hear what he said, I saw him speak.

Q. What did the helper do after he spoke to him?

A. He got out of one side of the track and gave the motorman the signal to come ahead.

Q. What did Mr. Hammer do at that time, if anything, after the helper gave the signal to come on?

A. He got in the hole, was sticking in the hole.

Q. What did he say?

A. Not right after, he didn't say anything after.

Q. Did you see him do anything?

A. No sir, just when he was talking to his helper.

Q. What did he say or do?

A. Oh, he just made a sign with his hand like that (indicating). I couldn't hear what he said.

Q. Mr. Hammer did?

A. Yes sir.

Q. And then after he made that sign, what did the helper do, if anything?

A. The helper jumped out on one side of the track, and gave the signal to the motorman to come ahead on the same side.

Q. Same signal?

A. Yes sir.

Q. How was the car going after it stopped, in respect to speed? How was it moving?

A. It was running easy.

Q. How?

A. The car was running easy. It wasn't running very fast.

Q. How?

A. The car was running easy at that time.

Q. Easy?

A. Yes.

Q. Well, I mean fast or slow?

A. Slow.

Q. Now, what did I understand you to say that Mr. Hammer did after the helper saw — talking to him there?

A. After the helper jumped Mr. Hammer got into the hole like this, (indicating) you know, sticking in the hole.

Q. So you couldn't see his head?

A. Yes.

Q. Who was the first one that got to Mr. Hammer, so far as you know, after he had been scalded in this calcine?

A. The first one that I saw was his helper.

Q. What did his helper do?

A. He pulled him out of the hole, helped him out of the hole, helped him to come out, you see.

177 Q. Pulled him out of the hole?

A. Yes sir.

Q. And then did anyone come up?

A. A whole lot of men come up; yes sir.

Q. But he pulled him out of the hole alone?

A. Yes sir, he helped pull him out.

Q. What did you do while he was pulling him out of the hole, if anything?

A. Well, I run to help him to blow the fire off of his clothes.

Q. Were there any others that helped after you took him out of the hole, to remove him?

A. After they took him out Mr. Bentley come up there.

Q. He was out of the hole then?

A. Yes sir.

Q. How far from it was he?

A. Just one side about fifteen feet.

Q. Fifteen feet?

A. Yes sir.

Q. What position was he when Mr. Bentley came up?

A. He was standing up.

Q. What?

A. He was standing up.

Q. Was he placed in any other position after that?

A. Not until after they put him in the little bed.

Q. Into the little bed?

A. Yes sir.

Q. Who went with him up to the hospital?

A. What is that?

Q. Who went with him up to the hospital?

A. I didn't see who came. I just kept attending to my own business there, you know.

Q. You are certain Mr. Bentley wasn't there when he was taken out of the hole?

A. Not before. Just when they got him out.

Q. Did you see this hot calcine when it started out to flow out from the bottom of the car?

A. I couldn't see it.

Q. Didn't see it?

A. Didn't see it.

Q. Were you in a position that you could have seen under the car?

A. Oh, if I lean down like that (illustrating) I could see it, but I couldn't see it standing up.

Q. You couldn't see it on the track after the car went by?

A. Yes.

Q. Did you hear Mr. Hammer say anything during that time?

A. At the time of the accident?

Q. Yes.

A. He just hollered.

Q. Hollered?

A. Yes sir.

Q. How far was the car over him at the time he hollered?

A. Farther about ten feet from the hole.

Q. Ten feet farther?

A. Yes sir.

Q. He didn't holler until the car had passed over him?

A. Oh, after the accident, you mean?

Q. Yes.

A. The car stopped about ten feet from the hole.

Q. The car stopped about ten feet after the accident happened, but I understood you heard him holler while the car was going over?

A. Well, I heard him holler while the car was running over, you know, but I didn't know that Mr. Hammer was there.

Q. You are positive, however, that the parties you have named were the only ones there before the accident, you and the two others and the motorman?

A. And the motorman, yes sir.

Q. And then Mr. Hammer; that was the fifth, wouldn't it be?

178 A. No, just four.

Q. Four, Will you describe to the jury the signal that Mr. Hammer gave after the helper left the bin in which he was at work?

A. What is that?

Q. Describe the signal that you say that Mr. Hammer gave after the helper left the hopper he was at, and went out and gave his signal.

A. Well, he was talking to him while he was sitting down in that hole, you know, while his helper was there. I just saw him move his hand right there like that. I couldn't hear what he said.

Q. That was after the helper left?

A. No, while the helper was leaning over there.

Q. Before the helper left?

A. He just stick in the hole, pull his head in like that (illustrating).

Q. Then what did the helper do?

A. Jumped to one side of the track and gave the signal to come ahead.

Q. Did the motorman come on then?

A. After the helper gave him the signal.

Mr. McFarland: That is all. Take the witness.



Cross-examination.

By Mr. Kearney:

- Q. What is your name?  
A. Gustavo Provencio.  
Q. What relation are you to Mauro de Provencio?  
— He is my cousin.  
Q. Est. Provencio?  
A. He is my cousin.  
Q. What?  
A. He is my cousin.  
Q. Well, you never told anybody at all anything about this case before coming here, did you?  
A. No sir; I did not.  
Q. This is the first time today you ever told any living person anything you knew about this case?  
A. Yes sir.  
Q. That is true, isn't it?  
A. Yes sir.  
Q. What are your regular duties about that smelter?  
A. My regular duties is a common laborer; that is all.  
Q. You are a common laborer?  
A. Yes sir.  
Q. You are working around the yards?  
A. Yes sir, in the yards.  
Q. On- job and another?  
A. Yes sir.  
Q. Since the accident the company hasn't laid you off, has it?  
A. They didn't lay me off. I just keep working right the same.  
Q. Did they increase your wages?  
A. No sir, they did not.  
Q. Since the strike did they give you any assistance?  
A. No sir.  
Q. What?  
A. No sir.  
Q. Did they give you any assistance to come down here?  
A. No sir.  
Q. They didn't furnish you any expense money? Didn't pay your expenses down here?  
A. They paid my expenses over here to Tucson; that is all.  
Q. Is your recollection good?  
A. How is that?  
Q. Is your recollection good?  
A. Yes sir.  
Q. Did you and these other two Provencios ever talk this matter over?  
A. Not before.
- 179 Q. Not before?  
A. No sir.  
Q. One never said a word to the other about it?

A. Not before this today.

Q. How?

A. Not before today.

Q. You don't think you did?

A. No sir.

Q. Can you explain to the jury how you all agree on the car being stopped twenty or twenty-five feet; how you are just the same on that?

A. How do you mean?

Mr. McFarland: If the Court please, I object to that question. The Court: Objection sustained.

Mr. Kearney:

Q. Did you ever see me in Clifton?

A. Yes sir, I saw you there.

Q. Do you remember talking to me about this case at the pool hall there in Clifton?

A. Yes sir.

Q. Didn't you tell me that at no time there you could see Mr. Hammer?

A. I don't remember I told you.

Q. What?

A. I don't remember I told you.

Q. Isn't that what you told me?

A. Yes sir.

A. What?

A. Yes sir.

Q. And that you at no time—you could see Mr. Hammer, and you told me all you saw was the motion of Est., the motorman, to bring the car ahead; that is all you saw.

A. Yes sir; but you didn't ask me about Mr. Hammer in the hole.

Q. I asked you at the time if you could see Mr. Hammer in the hole and you said you couldn't see him.

A. No sir; I don't remember of saying that.

Q. What?

A. I don't remember of saying that.

Q. The fact is that you didn't see him?

A. I never told you that.

Mr. McFarland: I object to that.

The Court: Now, if you continue that between the attorney and the witness, you will get reversible error in this case, because you must not state facts when you are examining a witness. Now, gentlemen of the jury, counsel's statement of what he stated to counsel is not evidence in this case and you will not consider it for any purpose whatever.

Mr. Kearney: I will reframe that question for the purpose of putting an impeaching question.

The Court: Certainly you may.

Mr. Kearney:

Q. I will ask you if about four days before you came down here, that I was talking to you in the pool hall about this case, and you and I being present there, and I asked you what you knew about this case, and in that conversation didn't you say to me that you didn't see Mr. Hammer at all, because he was down in the hopper out of your sight?

A. I don't remember your asking me that question.

180 Q. And then further that you said in the course of that conversation that all you saw was the motorman give a signal to bring the car on? Did you or did you not then and there so state to me.

A. I didn't say anything about that.

Q. What?

A. I didn't say nothing about that.

Q. What?

A. I didn't say anything.

Q. You say you never did tell anybody anything about what you knew about this case?

A. No sir; I don't tell nobody.

Q. Never anybody at all?

A. No sir.

Q. Nobody ever asked you about this case, or what you knew about it?

A. No sir.

Q. What?

A. No sir.

Q. Can you explain how it was that you came to be called as a witness if you didn't tell anybody what you knew about this case?

A. Yes sir, you mean how it happened to me to be up there?

Q. Yes, at any time?

A. Well, I was working in the yard, you know, and one of the men of the furnace laid off that day, and the furnace man reported to the yard man, to the yard foreman to send a man up there, and the yard foreman sent me up there, you know.

Q. It wasn't your regular business to be up there at all?

A. No sir; it wasn't.

Q. Then after this accident happened weren't you called down before Mr. Flynn to make a statement?

A. Yes sir.

Q. What?

A. Yes sir.

Q. Did you sign that statement?

A. No, I didn't sign it.

Q. Then you did tell somebody what you knew about this case.

A. Yes, I didn't tell anybody else.

Q. What?

A. I didn't tell anybody else.

Q. What were you called before Mr. Flynn for?

Mr. McFarland: He says he didn't tell anybody else.

The Witness: I mean anybody else.

Mr. Kearney:

Q. Did you make a statement before Mr. Flynn?

A. No sir.

Q. Didn't he call you down there for the purpose of making a statement?

A. He called me just the one time, yes sir.

Q. What?

A. Just the one time.

Q. You didn't make any statement—didn't tell him anything about it?

A. No sir.

Q. Why?

A. I didn't know anything about it.

Q. You didn't know anything about it?

A. No sir, not until after.

The Court:

Q. What did you say the last? I couldn't hear you myself.

The Witness: I say I didn't say it to anybody else after making the testimony over there at Flynn's office.

Q. You didn't say it to anybody else after you made the statement over there to Mr. Flynn, you mean?

A. Yes sir, I never tell anybody else.

181 The Court: Now, these gentlemen have to hear you. They cannot hear you speaking in that undertone.

Mr. Kearney:

Q. Do you know——

The Court: If you were on the ball ground you could make a noise.

Mr. Kearney:

Q. Do you know Mr. Elliott?

A. Yes sir; I know him.

Q. Do you know Mr. McFarland here?

A. No sir, I don't.

Q. You don't know him?

A. No sir.

Q. Did you ever talk to Mr. Elliott about this case?

A. No sir.

Q. Did you ever talk to Mr. McFarland?

A. No sir.

Q. Never said one word to them about this case?

A. Not one word, no sir.

Q. Never told them anything about what you knew about it?

A. No sir.

Q. Did you tell Mr. Fraser?

A. No sir.

Q. Not a single person?

A. No sir; nobody else.

Q. This is the first time today that you ever told anybody what you knew about this case?

A. This is the first time, yes sir.

Mr. Kearney: That is all.

(Witness excused.)

A. B. JONES called as a witness on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. McFarland:

Q. What are your initials?

A. A. B.

Q. Where do you live?

A. Clifton, Arizona.

Q. How long have you lived there?

A. A year last February.

Q. A year last February. What is your business?

A. Smelter foreman.

Q. Smelter foreman?

A. Yes sir.

Q. What relation do you bear to the Arizona Copper Company, if any, the defendant in this case?

A. General foreman for the Arizona Copper Company at the smelter.

Q. Were you occupying that position last December?

A. Yes sir.

Q. And particularly on the 28th of December?

A. Yes sir.

Q. 1914. Were you at the smelter that day?

A. Yes sir.

Q. Do you know of a method—do you know of two methods of placing angle irons on top of hoppers?

A. I suppose there are several methods.

Q. Yes, you know of several. Do you know of angle irons having been placed on hopper Number 3 of the smelter?

A. Yes, sir.

Q. Do you know the method pursued in placing those angle irons on the hopper?

182 A. Over Number 3 furnace, yes sir. They were put on from the top.

Q. What do you mean by the top?

A. Well, the workman didn't get into the hopper.

Q. Didn't get into the hopper?

A. Yes sir.

Q. Was the entire work done by the party who did it up on top of the feed-floor?

A. On top of the floor; yes sir.

Q. Did you see this party placing angle irons on the top of hopper Number 3?

A. I seen him working there; yes sir.

Q. What was he doing when you saw him?

A. He was putting in angle irons.

Q. Well, what was his position at that time?

A. He was on top of the floor bolting up the angle irons at the time I saw him.

Q. Bolting them up?

A. Yes sir.

Q. That is, you mean fastening these bolts by a screw that screws on top or the bottom?

A. Sir?

Q. By the screws that fasten that angle iron on the top or on the bottom?

A. I couldn't say which end was which, but I think the bolts were on the bottom, the nuts were on the bottom.

Q. Was anyone helping him?

A. Yes sir; there was two of them there—three of them there.

Q. What were their positions 'respectively?

A. They were all on the floor.

Q. Where the angle irons placed on that hopper successfully?

A. Yes sir.

Q. Who are present when you saw them place these angle irons on the floor and on top of the hopper, remaining on that feed-floor?

A. Who were there?

Q. Yes, who were present?

A. Harry Nielson and Jack Morrison and the Mexican helper; I don't know his name.

Q. Was that before the accident to Mr. Hammer?

A. After.

Q. After the accident?

A. After the accident; yes sir.

Q. After the accident?

A. Yes sir.

Q. Well, how much experience have you had in iron working around smelters?

A. In iron working?

Q. Yes, with iron.

A. Well, I have worked a little in a machine shop, three or four years in a machine shop, around a smelter—different places—not in this country.

Q. You understand, do you, from that experience, the proper way to put on angle irons under the circumstances that they were put on by Mr. Hammer and the party you speak of?

A. Well, I don't know, the proper way—the safest way—

Q. What is the usual way of doing that, if you know?

A. Yes.

Q. What is the usual mode or method pursued in placing angle irons?

A. The majority of those were put on from the top at that particular job.

Q. From the top?

A. Yes sir.

Q. Did you ever see anyone pursue the method of putting angle irons on hoppers under the circumstances existing there by going down themselves in the hopper?

Mr. Curley: I object to the form of the question. It simply proves a negative. It doesn't prove anything in this case.

183 Mr. McFarland: I asked him whether he had seen anyone.

Mr. Curley: Whether he saw anyone is not material.

Mr. McFarland:

Q. With your experience or knowledge of the situation, if you were to put angle irons on those hoppers what method would you pursue?

A. I would put them on from the top.

Q. Why?

A. Well, it would be safer.

Q. Would it be as convenient?

A. Possibly not quite as quick. You could probably do it quicker the other way.

Q. Was Mr. Fraser around hopper Number 3 at the time those angle irons were being placed, as far as you remember?

A. He wasn't on the feed-floor at the time I was up there. At that particular time—I think he was around during the time they were being put up.

Q. He is the manager, isn't he, or the superintendent of repairs?

A. Yes sir.

Q. That is his position?

A. Yes sir.

Q. It would be his duty to be around there, wouldn't it?

A. Yes sir.

Q. And to direct matters?

A. Yes sir.

Q. Did you see that calcine car the morning before the accident?

A. Yes sir.

Q. Where was it?

A. I have seen it several times.

Q. The morning before the accident?

A. Yes.

Q. What did you do, if anything, at any one time that you saw it the morning before?

A. Before the accident?

Q. Yes, the morning before the accident?

A. The car was standing on the floor there and I saw them working there, and I cautioned the motorman to obey his rules.

Mr. Curley: I object to that, if your Honor please.

Mr. McFarland: He is his superior. I suppose it would be proper.

The Court: I will sustain the objection unless it was in the presence of Mr. Hammer.



Mr. McFarland:

Q. Well, did you inspect or cause that car to be inspected that day?

Mr. Curley: I object as immaterial.

The Court: The objection is overruled. You remember the question you asked him as to the condition of that car, and why it let the slag through, or the calcine through.

A. Yes sir.

Mr. McFarland:

Q. What was its condition?

A. It was all right, in good condition.

Q. Now you say you inspected the car?

A. Yes, I did.

Q. Did you inspect the rods and the brakes?

A. No, I inspected the door or slide.

Q. The door?

A. Yes sir.

Q. In what condition was that?

A. That was all right.

184 Q. In what condition was it in other respects?

A. It was all right.

Mr. McFarland: Take the witness.

Cross-examination.

By Mr. Kearney:

Q. That car was in good condition at the time of the accident?

A. Sir?

Q. At the time of the accident that car was in good condition?

A. It was after the accident I inspected the car, and there was nothing wrong with it then. That is, the gates.

Q. Well, was it in good condition at the time of the accident?

A. Yes sir, I presume it was because right after the accident I inspected it.

Q. Then why did the calcine run out?

A. It caught something and pulled the door open, I presume, I closed the door myself and it was all right.

Q. What would it catch on, Mr. Jones, in going down there?

A. Well, it should not have caught on anything.

Q. Then why did you say it caught on something?

A. Well, I presume it did. It wouldn't open itself. It is impossible for it to open itself.

Q. Don't it open rather hard?

A. Sir?

Q. Don't it open rather hard?

A. Rather hard.

Q. Yes the lever that opens it pulls pretty hard, don't it?

A. It takes a fair pull to open it; yes sir.

Q. If the lever there was properly closed the calcine wouldn't run out, would it?

A. Certainly not.

Q. Then if the slides there were closed in that car when it went over the hopper in which Mr. Hammer was working he wouldn't have been burned, would he?

A. No sir; certainly not.

Q. Then the reason why that—that calcine ran out of that car is because someone managing it, or that it caught on something on the track that pulled the slide-door open?

A. Yes sir, I presume that is what happened.

Q. If the party in charge of that car, before passing over that hopper which Mr. Hammer was in, if he inspected that slide-valve and kept it shut, there would have been no harm, would there?

A. If that slide-valve was open he couldn't move the car.

Q. Well, how would that—how would the calcine get out if it wasn't open?

A. I say if the valve had been open when he started his car he couldn't move it.

Q. Didn't you state just a moment ago if the car was properly closed the calcine wouldn't run out?

A. It won't.

Q. Well, then, it did run out, didn't it?

A. It didn't run out when it was closed.

Q. How did that calcine get into the hopper where Mr. Hammer was working?

A. It run out of the door I presume.

Q. The door must have been open then, wasn't it?

A. Yes sir, it was open.

Q. You think that Mr. Hammer could have done little  
185 quicker work by getting down in that hopper than he could have done on the top?

A. On the top, I expect so.

Q. Could he have done a better job; couldn't he have made a closer fit?

A. I don't know that he could, no; I don't see any reason why he could.

Q. Wouldn't he have a better opportunity to mark it off with more precision?

A. No, I don't think he could.

Q. Do you know?

A. Do I what?

Q. You wouldn't say that he couldn't, would you?

A. I wouldn't say that he couldn't.

Q. What?

A. I say so, I wouldn't say that.

Q. You didn't do any of that work yourself, did you, on that furnace where Mr. Hammer was working?

A. No sir.

Q. You didn't put any of those angle irons in, did you?

A. No sir.

Q. You are in charge of a different department there, foreman of the smelter department?

A. Yes sir; operating department.

Q. And you would not wish to take the position, Mr. Jones, that Mr. Hammer did not do that job properly?

A. Sir.

Q. You would not wish to state that Mr. Hammer did not do that job in the proper way?

A. In a proper way? Just what do you mean by a proper way?

Q. Proper manner, or method—he didn't pursue a proper method in doing the work?

A. He didn't pursue the safer method.

Q. You would not say that he didn't pursue a proper method, would you?

A. No, I would not.

Q. Well, safe enough if that car hadn't been run over him, wouldn't it be?

A. I didn't just catch that.

(Question read.)

A. Had he gotten out of the hopper.

Q. It would have been safe enough if the car hadn't run over him.

A. Had he gotten out of the hopper when the car was passing over him.

Q. Or if the boy in charge of that, or the person who was in charge of that car—if he had kept that valve at the bottom shut, there was no danger, was there?

A. The boy didn't have the opening of that valve. It is impossible to open that valve, the man running the car to open that valve, when the car is running; and if the car is standing, and you open the valve you can't move the car. You haven't power.

Q. Mr. Jones, if that valve had kept shut there was no danger, was there?

A. Sir?

Mr. Kearney: Read the question.

(Question read).

186 A. I would consider it dangerous, yes, to stay under a car loaded with hot calcine at any time.

Q. Then would you say that car was in proper condition?

A. Yes sir.

Q. If a car is in proper condition it won't leak out the calcine, would it?

A. No sir.

Q. It wouldn't discharge the calcine until that lever was pulled for that purpose, would it?

A. No sir.

Q. Then if that car had been kept in proper condition, its valves closed, in passing over there it wouldn't have spilled out any calcine, would it?

A. The car was in proper condition.

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Q. Why did it spill out the calcine?

A. Well, something opened the valve.

Q. That is what I said awhile ago. If it had been kept closed no calcine would have come out.

A. Certainly not. It couldn't come out.

Q. Then Mr. Hammer was in no danger then, was he, if that valve had kept shut?

A. No, but there is always a possibility of hot stuff going over.

Q. There is a possibility?

A. Yes.

Q. Did you ever know of such an occurrence as that happening there before?

A. Sir?

Q. Did you ever know of such an occurrence as that happening before?

A. Of calcine?

Q. Yes, flowing out as it did there at the time Mr. Hammer was injured?

A. Did I ever know of it occurring before?

Q. Yes sir.

A. No sir, nor since.

Q. Say, I am going to ask you. Maybe you know. On the track where this car went over, the ways there, or platform, was there something there to catch the bottom of the car to pull the valve open?

A. There was an angle iron laying there on a small pile of slag—ores—that could have caught the car as it passed over. I threw the angle iron off of the track myself before I brought the car back.

Q. You know the angle iron was there when the car passed over it?

A. No, I wasn't at the place. They sent for me. They couldn't get the car back. The door was open and they couldn't move the car. I went up and closed the door—had it closed, and moved the car back and looked to see what caused it to open. I found an angle iron in a pile of slag between the track—between the rails—between the tracks.

Mr. Kearney: That is all.

Redirect examination.

By Mr. Elliott:

Q. Mr. Jones, did you examine the ground at the hopper after the accident to Mr. Hammer? Did you examine that ground there?

A. I presume—

Q. Did you examine the top of the feed-floor there?

A. Yes sir.

Q. Where did that spill begin? Was it before the car reached the hopper or at the hopper, or after it left the hopper in which Mr. Hammer was?

187 A. There was practically no calcine on the—let's see—on the north side of the hopper. It was strung along on the

south side, probably forty feet. The car was probably forty feet over when I got there.

Q. The spill was beginning at the hopper?

A. Yes sir.

Q. Close to the hopper?

A. Yes sir.

Q. Then if something interfered there to open that door, it interfered at or near the hopper?

A. Yes sir.

Q. Practically at it?

A. Yes sir.

Q. And in your opinion was that angle iron in a position and sufficient to have opened the doors?

A. It could have caught there; yes sir, in my opinion.

Mr. Elliott: That is all.

The Court: That is all, Mr. Witness.

Mr. McFarland: We would like to have that helper, Mauro Provencio, recalled.

The Court: It is five minutes to five now. Gentlemen of the jury, you will remember the instructions I have heretofore given you and keep them. Report tomorrow morning at half-past nine.

SATURDAY, NOV. 27th, 1915—9:30 a. m.

The Court: Proceed.

Mr. McFarland: If your Honor please, one of the witnesses who testified yesterday, this young Mexican, came to me last evening and said he got confused on the stand yesterday, and on reflection he finds that he wants to correct his testimony.

The Court: Very well.

GUSTAVO PROVENCIO recalled as a witness on behalf of the defendant herein, having been previously sworn, further testified as follows:

Direct examination.

By Mr. McFarland:

Q. You say you want to correct——

A. I want to correct a mistake I done.

Q. —your testimony yesterday in some respect?

A. Yes sir.

Q. Just state to the jury?

A. Mr. McFarland asked me a question about that I didn't tell nobody else besides this man, Mr. Elliott and Mr. McFarland. He asked me a question if I didn't tell anybody else besides Mr. Elliott and Mr. McFarland. I got confused yesterday, you see, and I said no, and I spoke to Mr. Elliott and Mr. McFarland at the hotel.

Q. Spoke to whom?

A. Spoke to Mr. Elliott.

Q. And myself you mean?

A. Yes sir.

188 Q. Now, how old are you?

A. I am eighteen years old.

Mr. McFarland: That is all.

Cross-examination.

By Mr. Curley:

Q. You stated yesterday that you did not know Mr. McFarland, didn't you?

A. I didn't know him by the name until today.

Q. When you were asked if you had ever talked to Mr. McFarland, didn't you state that you did not know him?

A. Yes sir; I did not know him before.

Q. When did you find out that you had gotten confused on your testimony?

A. Yesterday evening.

Q. Who told you?

A. I did myself. I was in Mr. McFarland's room yesterday evening.

Q. Oh, you were in Mr. McFarland's room yesterday evening?

A. Yes sir.

Q. And you found out that you had been confused?

A. Yes, sir.

Mr. Curley: That is all.

Redirect examination.

By Mr. McFarland:

Q. Were you in my room last night?

A. Yes sir.

Q. And that is when you first found out that you had been confused?

A. Yes sir.

Q. When you were in my room?

A. Yes sir.

Q. How did it just occur to you in my room?

A. I tried to think it over, you know.

Q. Did you think it over before that or at that time?

A. Before that.

Q. Before that, and then you came and told me about it?

A. Yes sir.

Mr. McFarland: That is all.

(Witness excused.)

A. B. JONES recalled as a witness on behalf of the defendant, having been previously sworn, was recalled and further testified as follows:

Direct examination.

By Mr. McFarland:

Q. I forgot to ask you one question yesterday which I will ask you now. What was the condition of the hopper Number 3 on which you stated the angle irons had been placed by a party from the surface of the feed-floor, at the time that he put the angle irons on?

A. It was practically full of ore, and the furnace running. That would be pretty hot in there.

Q. In the condition in which you state, you testified yesterday, as I understand, that the angle irons were placed on that hopper from the surface?

189 A. Yes sir.

Mr. McFarland: That is all.

Cross-examination.

By Mr. Curley:

Q. How full, Mr. Jones?

A. Sir?

Q. You say it was practically full of ore. How full was it?

A. Oh, probably half full.

Q. Probably half full?

A. Yes sir.

Mr. Curley: That is all.

Redirect examination.

By Mr. McFarland:

Q. That varies, doesn't it, the amount of ore?

A. Yes.

Q. Sometimes it is nearly full?

A. Sometimes it is clear full, as they happened to use it out, and then it is refilled again. It is most of the time full when the furnace is running.

Juror Pacho:

Q. What is the distance between the valve on the bottom of the car from the flooring?

A. You mean the gate that opens the calcine car?

Q. Yes.

A. Oh, probably ten inches.

Q. Ten inches?

A. Probably that; yes sir.

Juror Pacho: That is all.

(Witness excused.)



MAURO PROVENCIO recalled as a witness on behalf of the defendant, having been previously sworn, further testified as follows:

Direct examination.

By Mr. McFarland:

Q. How did you get the—how about the angle irons—where were they taken from up to the surface of that feed-floor?

A. Where were they taken?

Q. Yes, where did you get them?

A. We got them down on that boiler shop.

Q. Well, did you take any angle irons onto the feed-floor after dinner in the afternoon of the day that Mr. Hammer was hurt?

A. Yes sir.

Q. How many?

A. I took one and he took one.

Q. What did you do with the one which you took up?

A. I took them down where we were working.

Q. Well, what did you do with it? Did you give it to anybody?

A. Yes, I gave it to him when he *get* in the hopper.

Q. When he got in the hopper you gave him the one you brought up?

A. Yes sir.

Q. Were there but two up there?

A. Yes sir.

Q. The one he took and the one you took?

190 A. Yes sir.

Q. That is all there was there?

A. Yes sir.

Mr. McFarland: That is all.

Gentlemen, I will read you what it is agreed between the parties to this case would be the testimony of Harry Nielson, if he were present.

Mr. Curley: I don't know whether that statement is just an accurate statement of the conditions or not, your Honor. There is an affidavit filed here by Mr. Fraser that this party would testify to certain facts. In order to avoid a continuance we are compelled to agree that if present he would testify to the stated facts. It is stipulated.

Mr. McFarland: Well, if he were here he would testify as in that paper contained.

Mr. Curley: I just don't like it to go to the jury that it is a case of open stipulation upon our part.

The Court: Well, as a matter of fact, whenever a witness is absent, as is the case here, and they are unable to secure his testimony, and the opposing side, as in this case, admits that if he were here he would testify to the facts stated in the paper filed; then it goes to the jury as though that witness were present and testifying as a witness

in the case. You do not admit the truth of the statements therein contained, but you do admit——

Mr. Curley: I just wanted the jury instructed.

The Court: Let me finish please. But you do admit—and I want the jury to understand—that they admit that if the witness were here present testifying, he would testify to what will be read in your presence and hearing.

Mr. Curley: But that we do not admit the truth of the facts.

The Court: I have already stated that.

Mr. McFarland: Yes, just like any other witness.

(Reading:) "State of Arizona, County of Pima: George W. Fraser, after being first duly sworn——

The Court: That part need not be read. Just read what that witness would testify to if he were present.

Mr. McFarland (reading): "That said Nielson, if present, at this time would testify that on the 28th day of December, 1914, he was foreman of repairs at defendant's smelter, at or near Clifton, Arizona, and as such foreman, one of his duties was to instruct employees in his department as to the method or methods by which said employees in his charge were to construct and repair certain parts of machinery over which he had charge as foreman of repairs; that some two weeks prior to the alleged accident and injury of plaintiff, he directed 191 the said plaintiff to go upon the feed-floor of defendant's smelter and place angle irons on top of the hoppers and below the feed-floor level. The purpose of placing the angle irons on top of the hoppers was to prevent material placed in said hoppers from overflowing through the space between the top of said hoppers and the bottom of said feed-floor. This space between the top of the hoppers and the bottom of the feed-floor was left at the time of the construction of the furnaces in said smelter, and the closing of this space was a necessary work in the completion and operation of the smelter, and in the protection of employees working below the hoppers; that at the date of the direction to the plaintiff to place angle irons on top of these hoppers, the said Harry Nielson directed and instructed plaintiff in person specifically that in placing these angle irons he should remain upon the surface of the feed-floor of said smelter, and in no event should he get into the hoppers at any time during his work in placing these angle irons, as trains were passing from time to time, back and forth over this feed floor, and over the hoppers where he would be engaged in placing the angle irons; that remaining upon the surface of the feed-floor was the only safe method of placing the angle irons; whereas the method of placing these irons by getting into the hopper while placing the same was a very dangerous method; and in no event to attempt to place them by getting into said hoppers under the feed-floor, but to remain on top of the feed floor in placing these angle irons on the hoppers, as it was a perfectly safe way; whereas the other method of getting into the hopper was an extremely dangerous way. That in supplementing that particular instruction the said witness, if present, would further testify that he went upon that feed-floor with the plaintiff, and standing above said hoppers in person showed said

plaintiff the safe and proper method of placing said angle irons, without getting into said hopper. That there is no other person to the affiant's knowledge who would testify to the facts herein stated; that there is no other witness present who has any knowledge of the facts herein stated; that would or could testify to the facts above stated; that there is now and has been since the 11th day of September, 1915, a strike in progress against this defendant in which a large majority of employees of defendant are participating; this condition necessitating the closing down of the smelters, mines, and all other works of the defendant. Owing to this condition many of the employees have gone to different places—some to other states—and among those Harry Nielson, who affiant is advised and believes——”

Mr. Curley: I object to reading any of the affidavit except the——

Mr. McFarland: This tells why he is away, and why he can not get here.

Mr. Curley: That is immaterial as far as the jury is concerned.

The Court: Yes, that is immaterial, and counsel's statement that they admitted that because they wanted his statement is immaterial. All those matters are preliminary to the introduction of this testimony, at the commencement of the trial, and all that is directed to the jury is what you expect to prove by this witness were he present.

Mr. McFarland (reading): “That said Harry Nielson if present would further testify that he did not know, nor did defendant or anyone who had authority to represent the defendant know that plaintiff had adopted a different method in placing said angle irons to the method directed by said Harry Nielson, until after the alleged accident and injury.”

Mr. Elliott: We will call Doctor Butler.

JOEL IVES BUTLER, M. D., called as a witness on behalf of the defendant herein, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Elliott:

Q. Doctor, will you please state your full name to the Reporter?

A. Joel Ives Butler.

Q. What is your profession?

A. Physician.

Mr. Curley: We will concede the Doctor is qualified.

Mr. Elliott: I will just ask one or two questions.

Q. Where are you practicing, Doctor?

A. Tucson.

Q. Are you connected with any organization here?

A. With the Rodgers Hospital.

Q. What particular line of work, if any, do you carry on at the hospital?

A. Surgical work.

Q. Are you acquainted with Mr. Joe Hammer here, the plaintiff in this case?

A. No, I am not.

Q. Have you ever made any examination of him?

A. No, I have taken X-Ray pictures of him, but simply as an X-Ray operator. I made no examination.

Mr. Elliott: For the purpose of convenience and to expedite the examination I ask that Doctor Butler be allowed to examine Mr. Hammer's hand.

Mr. Curley: We have no objection.

Mr. Elliott:

Q. Will you examine Mr. Hammer's left hand, please, Doctor?

(The witness left the witness stand and proceeded to examine the plaintiff's left hand; after which the witness resumed the stand.)

Q. Now Doctor, assuming for the purpose of the questions I will put to you—assuming that this hand of Mr. Hammer's was injured on or about the 28th day of December, 1914, and that Mr. Hammer submitted himself to certain treatment from the time of the injury until about the month of July, 1915. That places the period from the time of the burn at almost a year; your examination of 193 the hand here today about eleven months. Now, if you had a case of a burn of a little finger such as Mr. Hammer's here, in which scar had drawn it into the palm and rendered it useless and in the way, in your opinion would it not improve that hand to remove the fingers, the little finger?

A. Yes, it would.

Q. In a hand where the little finger is drawn down to the palm and interferes with the usefulness of the hand, it would then be a benefit to remove the finger, in your opinion?

A. Yes sir. I might add that providing that finger could not be surgically restored, plastic surgical operation.

Q. What is your general opinion, Doctor, of the condition of Mr. Hammer's hand from your examination of it?

A. Why, that he has a decidedly impaired member. The hand, or the function of the hand is decidedly decreased; the value of the hand is decidedly decreased at the present time.

Q. If you had such a hand even a year after the injury, in your opinion could this hand be now operated upon and improved?

A. Very much.

Q. How?

A. By plastic surgical operations which would release the adhesions and increase the mobility of the tendons; also make the skin more movable, and consequently, permit the fingers to regain their function.

Q. In your opinion then might it be possible that with proper treatment as you have detailed here, to give Mr. Hammer a fairly useful hand?

A. Yes sir; he has considerable use of the hand now, and which could be very much increased by proper surgical treatment.

Q. You say he has considerable use?

A. The hand under the present conditions, if nothing further is done with it, will be of considerable value to him.

Q. Then assuming that Mr. Hammer has a fairly good hand except for the little finger, which could not be fixed possibly would it be possible to remove the little finger and Mr. Hammer have a useful hand for almost any kind of manual labor?

A. Well, the removal of the little finger would get that out of the way. He would not be hampered by this deformed little finger, and as time goes on, the scars will—and the plaintiff attempts to use the hand—will release, will mobilize the fingers very much more than they are at present.

Q. You have seen this hand after it has been allowed to draw and contract for nearly nine months. Is this drawing not a kind of continuing process; the fingers for some months being inclined to keep contracting if not interfered with or prevented in some manner?

A. Yes, scar tissues always tends to contract.

Q. Do you think that Mr. Hammer himself by his own manipulation, independent of any treatment of the doctor, might have extended his fingers well enough to have prevented this natural contraction?

A. I don't know how much he has attempted to, but the attempts of the patient, the efforts of the patient are always very useful in preventing contraction. The patient himself usually has nothing else to do but work at his hand, massage his fingers; and passively they can do a good deal.

194 Q. Now, what do you—in respect to preventing the drawing up of these fingers, what would you have prescribed, say two or three months after the injury upon healing of the burns?

A. Why, I should have used some device which would have prevented the—which would have tended to hold the fingers in the straight position rather than permitting them to contract. Then, as I say, massage and manipulation and movement would have also done that.

Q. What generally would be the character of the device that you might use?

A. Usually a straight splint.

Q. Now, Mr. Hammer on the stand here has testified that Doctor Smith, his first attending physician, wished to break down his fingers. What is meant by that, by surgeons and physicians, the words, breaking down?

A. Well, it usually expresses breaking down of adhesions by forcible manipulation, forcible movement of the contracted members, straightening them by pressure.

Q. That also might be done with the use of a splint?

A. Well, the splint will retain it in that position, that is obtained by the manipulation. And then there are devices, spring splints

which keep a continual pulling on the finger, placed behind the finger and keep a tension on the finger.

Q. Now, Doctor, if you had a patient who was dependent on manual labor for a living, and you advised the removal of the little finger to improve his hand, and also advised straightening the other fingers under gas, and he decided not to have anything done by you or anyone else, would you be in a position to do him any good?

A. I don't know anything else that could be advised for him.

Q. You would consider that to be the proper surgical advice to give in such case?

A. Yes sir.

Q. And one that should be followed by the patient in order to obtain the best results in the case?

A. Yes sir.

Q. Then from your testimony, Doctor, you would not advise amputating all the fingers of Mr. Hammer's hand, leaving just the stump there?

A. No.

Q. Why not?

A. Because several of the fingers are useful.

Q. They are useful, now, and could be made more so?

A. If not useful at the present time.

Q. Now, if Mr. Hammer's hand could have been operated on and treated in the manner in which you have suggested to be the proper operation and treatment, by straightening or by cutting if necessary two or three months after the burn, the original injury, how long, in your opinion, would it take to clean up such treatment and return the plaintiff to doing some kind of work?

A. He should have had—I should think this hand would have been restored to function in six months. I think that is a good fair estimate of time.

Q. Then if Mr. Hammer had submitted himself to such an operation and undergone such treatment, even now he might have returned to some work?

A. Yes, I think so.

Q. If you passed a stomach pump, Doctor, into a patient, and extracted a test meal from the stomach, and on testing it for blood you found blood, would you consider that to mean that the patient had an ulcer of the stomach conclusively?

195 A. No, there are other factors that would have to be considered.

Q. What are those other factors?

A. You would have to consider the food—have to consider as to whether he had eaten meat, meat of some animal previously. For instance, there is a possibility that the stomach may retain a meal previously eaten for some time. I have seen them for a number of days, and of course the blood which was taken with that meat would show a test, would show in the test. And then you stated the stomach tube was used?

Q. Yes.

A. There is always a possibility that a tube, even though rubber,

may have abraded and scratched the mucuous membrane in the stomach, which is rather sensitive membrane, and given bleeding by that cause, which would show a test meal.

Q. And is it not a fact that the smallest amount of blood that might be started by that stomach pump going down into a patient would show in the test meal?

A. The tests are very delicate.

Q. If upon examining a patient to determine whether he had a stomach ulcer, and if on examination of the patient's stools you found no blood, wouldn't the absence of blood speak against the existence of a stomach ulcer?

A. You say if no blood—

Q. No blood was found, would not the absence of blood speak against the existence of a stomach ulcer?

A. Yes, the majority of instances show blood in the stools.

Q. Can you state from your experience and knowledge what percent of cases show a trace of blood?

A. In at least seventy-five percent of cases would show blood in the stools.

Q. Get a positive blood test?

A. Get a positive blood test in the stools.

Q. Now, in your opinion from your experience as a physician and surgeon, what connection is there between burns and ulcers of the stomach?

A. Why, I have never seen any cases associated—never seen any ulcers associated with burning cases. The literature on the subject always mentions burns as—ulcers as a possible sequence of extensive burns. I have never seen a case. I might add there is other recent literature, of which cases studies have been made, and in which no association has been found.

Q. I was just going to ask you if it was not the later theory, based upon research and examination, compilation of statistics, that there appears to be no connection between burns and stomach ulcers, and that the old text-book theory is now rather exploded?

A. Yes it has. Recent studies have destroyed that idea.

Mr. Elliott: Take the witness.

Cross-examination.

By Mr. Curley:

Q. What recent study do you refer to, Doctor?

A. Some books by authoritative writers in which they have made studies of their cases, and the history preceding their cases  
196 of ulcers, and have found no association.

Q. You stated though that recent study had exploded that. Now you aren't giving your own opinion of that, are you?

A. I have stated I have never seen any association myself. Consequently, my own experience, study or histories of my own cases would bear out that statement, that no association is there. My experience would be too small to base any generalizations on, and con-



sequently I pay more attention to those who have had a great many more cases.

Q. What experience have you had with stomach ulcers which would permit you to testify as to your own experience?

A. Well, I have probably seen between one hundred and two hundred cases of stomach ulcers.

Q. In these cases which you have seen did you make tests to ascertain the probable functions of the ulcer, the characteristics of it?

A. They were all thoroughly—the cases were thoroughly studied.

Q. How many cases of stomach ulcers have you had come under your personal supervision in which it were possible for it to have been caused by a severe burn?

A. Well, as I say, I know of no cases at all in which the association between burn and ulcer appears in any way.

Q. What position does Doctor Osler occupy in the medical world?

A. There is no greater authority.

Q. There is no greater authority?

A. No sir.

Q. And Doctor Osler's theory is that there is a connection between the burn and the ulcer.

A. His text-books always give that as a possible cause of ulcer.

Q. And you regard him as probably one of the greatest authorities?

A. I do. Probably not on this particular subject, but as a whole.

Q. As a whole?

A. As a whole, there is no greater authority that I know.

Q. Now you stated that this operation upon Mr. Hammer's hand would probably have restored it to a great degree, to its normal condition?

A. Yes sir.

Q. Did you take into consideration there the general condition of his arm from the wrist up?

A. I examined it as far as the scar on his wrist.

Q. Do you know what the general condition of his arm is at the present time?

A. Not above the wrist.

Q. So that in testifying as to the probable return to a near-normal condition, you simply had reference to the fingers, to the functions of the fingers?

A. To the injuries that appeared to his hand. I was speaking about the possibility of returning function for the hand.

Q. Would it be possible, Doctor, in your opinion to ever produce anything like a normal hand, a normal arm, out of Mr. Hammer's left hand and arm?

A. Well, you mean like—he would have a hand that was—with which he could do very many things, which would be useful.

Q. Yes. Mr. Hammer's occupation for a great many years has been that of a boiler-maker, in which he would, of course, want to use a large hammer in either hand. What would you say as to restoring that left hand to a condition under which Mr. Hammer would be able to resume that occupation?

A. Is he right-handed or left-handed?

Q. He is right-handed.

A. I am not very familiar with the boiler-maker's trade. So far as I know, he will have—I know that the business is—he will have a hand in which he can securely grasp practically anything that he wants to.

Q. And after having grasped it what would you say as to his being able to use it with effect in a boiler-maker's job?

A. As far as the hand was concerned, he would be able to use it.

Q. Would the cutting off of the little finger impair the use of his hand in any way, as far as grasping is concerned?

A. Yes it would.

Q. It would. You stated, I believe, that at the time of Mr. Hammer's injury, that in your opinion a certain line of treatment would have left Mr. Hammer's hand in a very much improved condition.

A. Yes sir.

Q. If you had had Mr. Hammer under your care during all that time and his hand had resulted in its present condition what would you think as to the mode of treatment, that he had received?

A. Well, I should think there had been neglect of the hand.

Q. You would think it had been neglected?

A. Yes sir.

Mr. Curley: That is all.

Redirect examination.

By Mr. Elliott:

Q. Doctor, if you had advised the carrying on, or offered to carry on this treatment of Mr. Hammer and he had refused to submit to it, would you still feel that you had neglected him?

A. No.

Q. Would the scar on Mr. Hammer's arm interfere at all with the functions of his hand?

A. Well, you mean—I haven't seen his arm. I examined his hand only.

Q. As referred to by Mr. Curley?

A. I have not seen—you mean those that are in sight now below the wrist, from the wrist down? I did not examine—I only examined the hand, and am aware of the injuries. As far as anything I saw was concerned, very much can be done with the hand to improve it.

The Court: I didn't understand that.

The Witness: I say as far as anything I saw is concerned very much can be done for the hand by surgery to improve it.

Mr. Elliott:

Q. Are you familiar with Doctor Moynihan's work known as Duodenal Ulcer?

A. Yes sir.

Q. On that particular subject would you consider Moynihan as good or better than Osler?

A. I should.

Q. Which?

A. He is better. There is no one ranks higher than Moynihan on the subject of ulcers of the intestinal tract or the stomach and duodenum.

198 Q. State if you can, Doctor, what position in your mind Moynihan takes in relation to burns relating to ulcers?

Mr. Curley: I object to that, if your Honor please.

The Court: Objection sustained. The witness may give his opinion as an expert and he may base his opinion upon the work of a particular eminent author on the subject of the disease or injury in question.

Mr. McFarland: If the Court please, the defendant rests.

The Court: Anything in rebuttal?

Mr. Curley: Yes, your Honor.

The Court: I hope you will confine it strictly to rebuttal.

Mr. Curley: Yes, your Honor, strictly.

ELMER BENTLEY, called as a witness on behalf of the plaintiff in rebuttal, having been previously sworn, further testified as follows:

Direct examination.

By Mr. Curley:

Q. Mr. Bentley, do you know Mauro de Provencio, the young fellow that testified here who was a helper to Mr. Hammer at the time he was injured?

A. Yes sir.

Q. Immediately after Mr. Hammer's injury did you have any conversation with him as to why the boy operating the car did not stop the car before it ran over the hopper?

Mr. McFarland: I object to that. No foundation is laid for this.

Mr. Curley: Oh, yes, there was. Mr. Kearney asked that boy a question that we had written down here: "Immediately following the injury to Mr. Hammer didn't Mr. Bentley say to you, 'what was the matter with the fellow, (referring to the motorman) that he didn't stop the car.' Did you not then say to Mr. Bentley, 'The brakes wouldn't work,' or words to that effect."

Mr. McFarland: I have no recollection of that particular conversation at that time or place. Any way, if your Honor please, it is apparently immaterial what the condition of the brakes was—wholly immaterial for the reason that this action is not based upon negligence. It is based upon an accident occurring in a hazardous occupation while the party is pursuing his occupation,—growing out of it. That is the basis of this action. It is wholly immaterial whether there was any brake on it or not. The defendant may be ever so negligent, but under the law upon which this action is based it is not at all material. The only feature that is material is the negligence on the part of the plaintiff. If his negligence caused the injury or produced the injury, he cannot recover, but it

is bringing into the case an entirely foreign element. It has no place in the case. The statute with which your Honor is so familiar says that if one receives an injury in a hazardous occupation—smelting is one—while pursuing the particular duties of his occupation, in the course of his employment, the defendant is liable provided that the accident and injury did not result from the negligence of the plaintiff. Now, where does the negligence of the defendant cut any figure in this action. It is all out of place, and the only reason that I called that little boy in here this morning and asked him how many angle irons were taken up there—he said there were two, and the one he took up was give—to Mr. Hammer—was to rebut what they said about that angle iron on cross examination yesterday afternoon. But for them I should never have done it, and I will only say I was neglectful that I did not object to that testimony at the time because it was wholly immaterial. I don't care what the condition of that car was—good, bad or indifferent. My theory of this situation is that the defendant is practically an insurer of the safety of persons in hazardous occupations, unless caused by the negligence of the employee himself. If so, he cannot recover. Now why should we go out of the issues in this case and the material facts that cause or constitute the grounds of action and speculate? You might just as well ask the condition of the track, whether the smelter was constructed properly, or any other fact tending to show want of care on the part of the defendant. Now there is an action brought under the compulsory compensation act. Then it would have been a fact in the case, but not under the employers' liability act. It is solely upon an accident occurring to one in a hazardous occupation while he is pursuing his duties in that hazardous occupation, that constitute the cause of action, and even then, if that be true, that is all they have to prove except that they must show to the jury's satisfaction by a preponderance of the evidence that the injury did not result from his own want of care or negligence. If it did, it bars this case. I say it is wholly immaterial, and I object to it.

Mr. Curley: If your Honor please, Judge McFarland's theory as to the law in the case is absolutely correct, but the purpose of this testimony is to impeach the witness. Now Mr. Bentley testified that this car moved continuously from the time it came upon the floor until it moved over the hopper where Mr. Hammer was. Mr. Hammer said when he first saw the car, the car was within five feet of him. Now here is a boy that says the car stopped twenty-five feet, and after hearing some conversation with Mr. Hammer, he motioned to the motorman and the car came on.

The Court: I don't care to hear any further argument.

Mr. McFarland: Well, one more thought, and I will submit it; that you cannot impeach a witness upon an immaterial issue.

The Court: The trouble is, that you and the other side both entered into an examination of the condition of that car and  
200 you permitted it to be introduced without objection. Both sides examined into it and for that reason—

Mr. Curley: The purpose of the question is to impeach the witness.

The Court: I understand that, but you cannot impeach the witness upon an immaterial matter. The question is this: where parties frame their issues to try a case upon a certain theory and introduce testimony with reference thereto, I don't think you can be heard to say afterwards that the evidence was immaterial.

Mr. McFarland: Now, let me ask your Honor one question, if I may be permitted to. I don't mean to trespass upon your Honor's domain.

The Court: I understand.

Mr. McFarland: But won't your Honor instruct this jury that the negligence of the defendant will cut no figure in this case?

The Court: Yes.

Mr. McFarland: Then why would it be proper or pertinent to have the witness testify as to what another fellow said about the brakes?

The Court: Well, I don't like to give my reasons for my ruling in the presence of the jury, but inasmuch as you ask me, if you desire—

Mr. McFarland: No sir.

The Court: I shall state the reason and permit the question. I overrule the objection. You may answer the question.

(Question read.)

Mr. McFarland: We save an exception.

A. I did; yes sir.

Mr. Curley:

Q. What did he say?

A. He said—

The Court: Now, you will have to put the same question to him that you put to the other witness.

Mr. Curley:

Q. Did you then state, or did you then ask this Mauro Provencio a question similar to this: "What was the matter with the fellow, (referring to the motorman) that he didn't stop the car?"

A. I did.

A. And did he not then say to you—

The Court: Did he or not then say to you—

Mr. Curley:

Q. "The brakes wouldn't work, the fellow said," or words of that import?

201 A. He did, he says the brakes was no good.

The Court: Answer the question "yes" or "no."

Mr. McFarland: We object to that. That is hearsay.

The Court: The latter part of his answer is stricken out. His answer "he did" is allowed to stand. The objection is overruled.

Mr. Curley:

Q. Mr. Bentley, was Gustavo Provencio there at the time of this injury?

A. That is the tall Mexican that was here?

Q. Yes.

A. No, sir, he was not.

The Court: You have gone over that.

Mr. Curley: How is that?

The Court: I say you asked all those questions on direct examination.

Mr. Curley: I did not recall whether I asked him about that or not.

The Court: Whether the Mexican assisted in taking him out of the hole.

Mr. Curley: Yes, but there are three Mexican boys here now. I am asking him about Gustavo now, whether he was present.

The Court: Well, he said he wasn't. I will let the answer stand.

Mr. Curley:

Q. Mr. Bentley, would it have been possible to have put angle irons in one of those hoppers if it had been more than half-full or half-full?

A. No sir.

Mr. McFarland: Just wait a minute. We object to that. That would be——

The Court: Mr. Witness, when an objection is made you must not answer the question.

Mr. McFarland: That would be a part of the plaintiff's case to show the fact that it could be done, it is a practical way to do it, and the other could not be done and that would have been an impractical way to do it. That is going back and making his case again in rebuttal.

The Court: The objection is overruled.

Mr. Curley: Would it be possible for a man to——

Mr. McFarland: Let me just ask him one question.

Q. What experience have you had, Mr. Bentley, in putting in angle irons?

A. Well, I have worked at the repair works since I have quit stationary engineering, about a year and a half at repair work, handling iron.

202 Q. In that particular line of work?

A. Sir?

Q. In placing angle irons?

A. All kinds of work.

Q. I mean that particular way, particular method, did you ever place any angle irons on a hopper yourself?

A. Yes sir.

Q. Where?

A. At the smelter.

Q. At Clifton?

A. Yes sir.

Q. Up on top of this feed-floor?

A. Yes sir.

Q. How many irons did you place?

A. Well, I couldn't say as to how many, but I have repaired, there, doing construction work, too.

Q. And you are quite positive that you have placed angle irons?

A. I have worked on them.

Q. By going into the hopper?

A. No, I couldn't say that I went in the hopper. It wasn't necessary for me to go into the hopper at the time I was working on them.

Q. Did you have any experience in placing those angle irons, by remaining on the feed-floor?

A. Sir?

Q. Did you have any experience in placing those angle irons by remaining on the feed-floor?

A. Yes sir, at various places.

Q. That is practicable then to do that?

A. Sir?

Q. It is practical then to remain on the feed floor and put those angle irons in the hopper?

A. To lay on the feed-floor, you say?

Q. To remain on the feed-floor and put angle irons in the hopper.

A. Well, there is places where you have got to get in all shapes and forms to get angle irons in a place like that.

Q. This particular hopper up there on that feed-floor?

A. I can't say that I worked on this particular hopper.

Q. You would not say it was not——

A. No sir.

Q. You would not say it was not practical to put an iron in that hopper from the surface of the feed-floor, would you?

A. I did not understand the question, sir.

Q. Would it be practical to put an angle iron on top of a hopper—that particular hopper and remain on the feed-floor while you were doing that work?

A. No sir; it would not.

Q. It would *not* be practical to do that?

A. No sir.

Q. Would it be possible?

A. I don't see how a man could do it hardly.

Q. What is it?

A. I don't see how a man would do it.

Q. It is possible to do it?

A. No sir.

Mr. Curley:

Q. Mr. Bentley, if one of those hoppers was half-full of material of any kind, would it be possible to get that angle iron into the hopper through the opening?

A. It would not.

Mr. McFarland: Hold on, I wish the witness would obey the court's instructions.

The Witness: I did, but I was looking at the angle iron and look-



ing at this man. I did not speak before he asked the question, I believe.

203 Cross-examination:

By Mr. McFarland:

Q. Do you testify from your personal knowledge or as an expert that it is impossible for one to reach under a floor to the extent of eight inches with his hand? You testify it would be impossible to do that from the surface of the floor, put on that angle iron?

A. He is not reaching under there.

Q. One side of this floor, the distance from the surface back is eight inches. One the other side it is ten inches. Now do you testify as an expert or from personal knowledge that it would be impossible for one to put his hand under that floor ten inches on that side, or eight inches on this?

Mr. Curley: I object to the question inasmuch as there is no such testimony before the jury.

The Court: Objection overruled. The witness said he examined this place.

Mr. McFarland: The testimony was that that opening on one side was ten inches and on the other eight.

Mr. Curley: Mr. McFarland's question is "do you testify from your knowledge as an expert that a man could not put his hand in there eight inches." Mr. Bentley did not testify to that. He testified to the fact that a man could not put these irons in there—not that he couldn't put his hand in there eight inches.

The Court: I think the jury understand pretty well. He may answer if he can.

A. He couldn't; no sir.

Mr. Kearney:

Q. He wouldn't be able to see what he was doing in there, would he?

A. No sir.

Mr. McFarland: That isn't the question I asked him. That is not re-direct examination.

The Court: Stand aside.

Mr. Kearney: All right. That is all.

(Witness excused.)

JOSEPH B. HAMMER, the plaintiff, recalled to the stand in rebuttal, having been previously sworn, further testified as follows:

Direct examination.

By Mr. Kearney:

Q. Mr. Hammer, when you were treated at the hospital there by Doctor Smith, how long did that treatment, the manipulating and pulling of the fingers continue?

204 Mr. McFarland: Now, if your Honor please, that is not rebuttal. He testified to all that in his examination in chief, and we haven't introduced any evidence on it. We took the expert here, but this witness testified to the facts.

The Court: On what theory is that rebuttal?

Mr. Curley: To rebut the testimony of Doctor Butler that if certain things had been done he would have had a much better hand. He was asked the question, "now, Doctor, if within two or three months a certain treatment had been undergone, would he have had a much better hand." The doctor said "yes."

Mr. Kearney: We want to show what treatment he did undergo during that time.

Mr. McFarland: If the Court please, that isn't rebuttal. We have introduced no evidence as to how that hand was treated, except in the way of assumption to get the opinion of an expert—not the facts.

The Court: I will overrule the objection.

Mr. McFarland: Exception.

(Question read.)

A. My hand was treated until July the 2nd. The Doctor pulled these fingers just as hard as he could pull every day.

Mr. McFarland: Now, if your Honor please, has any evidence on the part of the defense gone in on that subject?

The Court: I think so.

Mr. McFarland: You think so?

The Court: Yes.

A. And also used the battery on this hand every day for over two months, and the hand wasn't improved any. I had to suffer quite a bit with it. This finger was pulled back until it was broken on both sides all the way around from here, (indicating) all the way around.

The Court: Now, Mr. Hammer, I think you are getting a little over the question that was asked you, and it isn't in rebuttal? What you were asked to do was to tell what treatment was given your hand.

Mr. Kearney: Just confine yourself to the treatment. What was done with your hand by the doctors.

The Court: Not what you suffered or anything of that sort, but just exactly what was done by the doctors?

A. Well, they put the electric battery on there in order to liven it up and get more looseness in the hand, and pulled these fingers, treated them every day to the best of their knowledge, and  
205 that is the result. That is all I can say. I gave them a good show until July the 2nd.

Mr. Kearney:

Q. Mr. Hammer, you stated it was impracticable to put those angle irons in that hopper the way it was done, or required to be done—do the work from the outside without getting into the hopper.

Now, I wish you would tell the jury why that is so, your reasons for it.

A. It is necessary for——

Mr. McFarland: I object to that. He gave his reasons for it and testified to all that on his examination.

The Court: Objection sustained. I think the witness has gone thoroughly into that.

The Witness: The- don't——

Mr. Curley: Just a moment, Mr. Hammer.

Mr. McFarland: Mr. Hammer, just a moment, until the court has ruled.

The Court: I have ruled. I say I sustain your objection because it is not rebuttal.

Mr. Kearney:

Q. Did you hear Mr. Jones say that it is practical to do this work from the outside?

A. Yes sir.

Q. Is that correct or not?

A. No sir.

Q. Why do you say no?

A. It is impossible to get the angle iron down through the opening, the way the angle iron is constructed there—impossible. I can prove it to you if I had the opportunity of doing so.

Mr. Kearney: I will ask to have the witness to illustrate, if the Court will permit him, to illustrate why.

Mr. McFarland: If the jury don't understand the situation, if it isn't clear to the jury I am perfectly willing that it should be done.

The Court: Oh, if you intended to have a hopper here in court you should have had it long ago, and I cannot now at this stage of the trial wait until you can make a design to illustrate that question before the jury. Then the defendant would be entitled to bring witnesses here and examine maybe a half dozen with reference to the particular design of construction before the jury, and we never would get through this case. I wondered during the trial why such an apparatus was not exhibited.

Mr. Kearney: No, I don't think the court exactly understood me. I may be mistaken in that. My purpose was—he said it would be impracticable to do it. Now it was simply to show, just a short illustration there, that he would be precluded from doing that by reason that he couldn't get the iron in there, and also on account of light.

The Court: If that is permitted, it opens up the case again, and they would have to bring their witnesses here.

206 Mr. Kearney: I don't wish to do that. I take it the court is right in the matter.

Q. Did you hear the testimony of the two Mexicans, the Provencio boys?

A. Yes sir.

Q. That they pulled you out of the hopper when you were burned up in there?

A. They never laid a hand on me, neither of them.

Q. They didn't help you out at all?

A. No.

Q. Who did assist you out?

A. Mr. Bentley and Mr. Nielson.

Q. Now, Mr. Nielson, Harry Nielson, was Mr. Nielson in charge of the work about the smelter?

A. Yes, he was under Mr. Fraser.

Q. Did Mr. Nielson at any time give you any instructions or directions?

Mr. McFarland: Well, now if the Court please, I remember particularly that he said that Mr. Nielson did not give him any particular directions or instructions, and he said further I remember distinctly, that he use- his own judgment in placing these angle irons. That is very distinct in my memory, I think. No, I asked upon cross-examination if Mr. Neilson took him up there and showed him particularly how to do this from the surface of the floor, and under no circumstances was he to get under the floor to attempt to perform this particular act, and he said no.

The Court: I sustain the objection because this witness was asked all about what took place between Mr. Nielson and himself.

Mr. Curley: That was upon cross-examination.

The Court: Well, it is immaterial, if he has made the statement.

Mr. Curley: This evidence has been put in since, and it is for the purpose of rebutting the evidence, what the witness has testified.

The Court: No, the predicate was laid by counsel for the defendant when this man was on the witness stand, and he was asked if Mr. Nielson did not do and say certain things, and this witness said no. Now, then, that testimony was introduced by the defendant in this case. I sustain the objection. I think this witness has told all that took place between Mr. Nielson and himself—statements that varied in detail.

Mr. Curley: Don't answer this question until the court has had a chance to rule upon it.

Q. Mr. Nielson has testified that he went on the feed-floor with the plaintiff, and standing above said hoppers in person showed the plaintiff (yourself) the safe and proper method of placing said angle irons without getting into the hopper. State whether Mr. Nielson did so go upon the floor and give you such instructions?

Mr. McFarland: I object because it is not rebuttal.

207 The Court: I sustain the objection because it is not rebuttal and because this witness has heretofore stated all that took place between himself and Mr. Nielson. As a matter of fact, I doubt very much whether you can impeach a witness whose statement is introduced in evidence, when he is not here.

Mr. Curley: Impeach a witness, you mean to contradict him?

The Court: Contradict the testimony when the witness is not given an opportunity of being present. I think the courts have so held. I am not sustaining the objection on that ground, but I know some of the—

Mr. McFarland: That is true, if your Honor please. We did not raise that objection.

The Court: I understand, but there is no question in my mind but what if you admit that a witness will testify, you do not admit it is true, of course, but you cannot impeach an absent witness. I know some of the courts have held that you cannot impeach an absent witness.

Mr. Curley: Not impeach.

The Court: That would be the effect of it.

Mr. Curley: Now, it would simply be testimony of a contradictory nature. That is all.

Cross-examination.

By Mr. McFarland:

Q. Now, Mr. Hammer, did you further hear Mr. Jones testify that Number 3 hopper had been repaired by placing angle irons in it similar to those that you placed in the one that you were injured in, and that the workmen remained on the top of the feed-floor while they did that work? Did you hear him testify to that?

A. Yes, I heard him testify to that effect.

Q. Well, now, what do you say to that? You heard Mr. Fraser testify to the same thing?

A. Yes, I heard Mr. Fraser, yes.

Q. What do you say to that testimony?

A. It is an impossibility to do it.

Q. What is it?

A. It is an impossibility to do it.

Q. Even if those two men swore that they did do it?

A. Yes, it is impossible, absolutely so.

Mr. McFarland: That is all.

The Court: Stand aside, Mr. Hammer.

(Witness excused.)

Mr. Curley: We rest.

(After being duly admonished, the jury was excused until 1:30 P. M.)

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SATURDAY, November 27th, 1915—1:30 p. m.

Mr. McFarland: At the conclusion of all of the evidence and before the argument of counsel, the defendant moves the court to direct a verdict in this case in favor of the defendant.

First, because the evidence submitted would not sustain a verdict, or support a judgment in the case:

Second, because the evidence in the cause, in fact, all of the evidence in the cause, shows that if the plaintiff received any injury at the day and date alleged in his complaint, that such injury was the result directly and proximately of his own negligence;

Third, because the evidence in the cause shows by an overwhelming preponderance that a verdict on the cause of action as alleged in the complaint should be for the defendant.

The Court: The motion is denied, and the matter will be submitted to the jury.

Mr. McFarland: To which we except.

(Arguments of counsel.)

Gentlemen of the jury, this is an action brought by Joseph B. Hammer, the plaintiff against the Arizona Copper Company, to recover from the defendant the sum of \$50,000 as damages for alleged personal injuries sustained by the plaintiff while in the employ of the defendant, said injuries having been sustained by the plaintiff at the time and place, and manner set forth in the complaint. The plaintiff's complaint and defendant's answer have both been read in your presence and hearing and I deem it unnecessary to again read them. You will recollect that, among other things, the complaint alleges in substance: that on or about December 28th, 1914, while the plaintiff was employed as a skilled workman in making repairs and improvements on a hopper on the feed-floor of the defendant's smelter at Clifton, Arizona, which said hopper was situated immediately beneath a standard-gauge railroad track over which electrically propelled cars filled with hot calcine were operated—and while the plaintiff was exercising due care for his own safety, and without any negligence on his part, a car so propelled on said track, and loaded with hot calcine, on arriving at the section on said track immediately above the hopper which the plaintiff was repairing, as aforesaid, and without warning to the plaintiff, discharged a large quantity of its contents and the sulphur fumes therefrom upon the body of the plaintiff; that as a direct result of the foregoing accident, which it is alleged was due to a condition or conditions of plaintiff's employment, the plaintiff suffered great physical pain and mental anguish; his head, the region of his neck, his right hip, both his right and left arms from the shoulder down and his left leg from the groin to the top of the foot *was* severely burned; and he was sickened and stifled by said sulphur fumes. That as a direct result of said burns, plaintiff's left arm is weakened; his left hand and the fingers thereof rendered useless; his right hip and left leg severely injured; he is greatly disfigured, scarred and crippled; and permanently disabled and incapacitated from following his usual vocation of boiler-maker, and from performing any manual labor requiring the use of his left hand and the fingers thereof.

209 The foregoing, gentlemen, recites in substance certain portions of plaintiff's complaint, and I would have you clearly understand that I have not stated and am not now attempting to state to you, the facts of the case as proved here at the trial. What I have just stated is the substance of the allegations set forth in plaintiff's complaint, and what he claims were the facts.

The defendant in its answer denies that said injury or injuries were of the nature or extent as set out in plaintiff's complaint. It denies all and singular, each and every other material allegation of plaintiff's complaint, and avers that if plaintiff was so injured, as

alleged in the complaint, it was by reason of plaintiff's own carelessness and negligence.

This action is brought by virtue of the laws of the State of Arizona, by virtue of Chapter 6 of Title 14, Civil Code, Revised Statutes of Arizona, 1913, entitled "Liability of Employers for Injuries to Workmen in Dangerous Occupations", commonly called and generally known as the "Employers' Liability Act". Under the provisions of this Act an employer in certain hazardous occupations—among them ore-reducing or smelting—is liable for the personal injury of an employee by an accident arising out of and in the course of such labor, service and employment, and due to a condition or conditions of such occupation or employment, in all cases in which such injury of such employee shall not have been caused by the negligence of the employee injured, and in such case the employer is liable even though he, himself, be wholly free from any fault or negligence. I say, under such conditions as I have stated to you, the employer is liable even though he himself be wholly free from any fault or negligence, provided, of course, that the injury of the employee shall not have been caused by his own negligence.

I charge you, as a matter of law, that the occupation of plaintiff on December 28th, 1914, if he was so employed, in or about defendant's reduction works, or smelter, is a hazardous occupation within the meaning of the said Arizona Employers' Liability Law.

It devolves upon the Court to state to you the law governing this case. If I state the testimony, I shall do it for the purpose of calling your attention to it and stating its tendency. If I intimate an opinion on a disputed question of fact, you are not to be governed by it, unless it corresponds with your own ideas as to what the facts are.

While it is the province of the Court to deal with the law of the case, it is exclusively your province to pass upon the facts. It is your duty to consider the evidence in the case as a whole, and not give undue importance to minor points or portions of the evidence taken piecemeal. Any case involving much testimony and many facts should not be decided upon the probability or improbability of any point singled out of the evidence, but a proper decision requires due consideration to be given to all of the evidence, direct and circumstantial, as well as documentary evidence in the case.

I charge you that you are made by law the sole judges of the facts in this case, and the credibility of each and all of the  
210 witnesses who have testified in the case, and of the weight you will give to the testimony of the several witnesses who have appeared before you. In determining the credibility of any witness and the weight you will give to his testimony, you have the right to take into consideration his manner and appearance while giving his testimony, his means of knowledge, any interest or motive which he may have, if shown, and the probability or improbability of the truth of his statements when considered in connection with the other evidence in the case. And in that connection, I charge you that the legal presumption is that witnesses speak the truth,



but this is but a *prima facie* presumption, and may be repelled by the testimony and the demeanor of the witnesses.

Under the law all races stand equal when introduced upon the witness stand, and there is no distinction made as to the presumption that the witness speaks the truth because of race or color. You are, however, the sole judges of the credibility of the witnesses, and you may, and should, take into consideration the intelligence of the witness, his understanding of the language used to him, and if he speaks through an interpreter, the difficulty of accurate translation, if, in your opinion, any such difficulty exists. And in this connection, you may take into account your knowledge of the difference in the vocabulary of the two races, if such exists.

If you believe that any witness has wilfully sworn falsely to any material fact in the case, then you have the right to wholly disregard the testimony of such witness except insofar as his statements may be corroborated by other credible evidence in the case, and by the facts and circumstances proven in this case. It will be your duty in arriving at a verdict in this case to be governed by the evidence which has been introduced before you, and the law as herein given you, regardless of the condition of parties hereto financially, or of the effect of your verdict upon the parties, or either of them. You are to look at the evidence in this case in a common-sense light, and to judge it by that experience and observation of human affairs of which you are possessed as individual members of society, and to endeavor to arrive at the truth as the evidence shows it to be.

I charge you that the burden of proof is upon the plaintiff to establish by a preponderance of the evidence the material allegations of his complaint, and if he has failed to do so, he cannot recover. By a preponderance of the evidence, I mean the greater weight of the evidence. It does not necessarily mean that a greater number of witnesses shall be produced upon one side or the other; it means the more convincing force, or the greater probability of the truth of the evidence on one side when compared with, or weighed against, the evidence in opposition. By burden of proof, wherever used in these instructions, is meant this: that the party upon whom the burden of proof devolves must prove or make out his contention by a preponderance of the evidence, as I have heretofore defined that term to you.

The first question to be presented to you for your consideration and determination is whether the plaintiff, Hammer, at the time and place mentioned in the complaint, and while in the service or employment of the defendant, and in the course of his labor, received the injuries, or any of the injuries, therein described; 211 that is, described in the complaint. If you answer this in the affirmative, that is, the plaintiff in the course of his labor, and while in the service or employment of the defendant, received the injuries complained of, then you will determine whether such injuries so received by the plaintiff were due to a condition or conditions of his occupation or employment, and if you believe from the evidence in this case that the plaintiff was so injured, and that

such injuries were suffered or caused by an accident arising out of such labor, service or employment, and that the same were due to a condition or conditions of such occupation or employment, then you must consider and determine whether or not such injuries were caused by the negligence of the plaintiff, Hammer, because, if such injuries were caused by the negligence of the plaintiff himself, then he cannot recover in this action and your verdict must be for the defendant. I say, gentlemen, if you come to this conclusion, that is, that the injuries alleged in the complaint to have been sustained by the plaintiff, or any of them, were caused by the plaintiff's own negligence, then he, the plaintiff, cannot recover in this action, and you need not go any further, in the case. You stop right there and return a verdict for the defendant.

Now the word "negligence" has been used a number of times in argument and in these instructions. By negligence is meant the want of reasonable and ordinary care which under the same conditions and circumstances would be exercised by a person of ordinary prudence and foresight. Negligence may consist of an act or of failure to act. It is therefore such an act that a person of ordinary care under existing conditions and circumstances would not do, or such a failure to do something which, under the existing conditions and circumstances, a person of ordinary care would have done:—As the Supreme Court of the United States has said:—"Negligence is the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation, or doing what such person under existing circumstances would not have done. The essence of the fault may lie in omission or commission—the doing or the failure to do. The duty is dictated and measured by the exigencies of the occasion." In no event can the plaintiff recover unless he has established by a preponderance of the evidence that the alleged injuries sustained by the plaintiff were not caused by his own negligence and therefore, if you believe from the evidence that the plaintiff's injuries were caused by his own negligence, or if the plaintiff has failed to establish by a preponderance of the evidence that the injuries complained of, if any, were not caused by his own negligence, then your verdict must be for the defendant.

You are instructed that if the plaintiff in this action negligently placed himself in such a position that injury resulted to him, and but for such negligence the injury would not have occurred, he cannot recover in this action and your verdict should be for the defendant.

You are further instructed that the law under which this action is brought bases the liability of the defendant for damages solely upon the fact that the accident and resulting injury were due to a condition or conditions of a hazardous occupation of an employee in the service of such employer in such hazardous occupation. If you are satisfied from the evidence in the case that the accident and resulting injury were due to a condition or conditions of such occupation, while plaintiff was in the service of the defendant in such hazardous occupation, yet the plaintiff would

not be entitled to recover in this action in such a situation unless the evidence in the cause further satisfied you that said accident and injury were not caused by the negligence of the plaintiff.

Where there are two ways of discharging a service apparent to the employee, one dangerous and the other safe, or reasonably so, the employee must select the apparently safe way, whether or not it is less convenient to him, and if he chooses the dangerous way, and the danger is such that a reasonably prudent person would not incur the risk under the same or similar circumstances, he is guilty of such negligence as would bar recovery, and your verdict will be for the defendant.

Now, gentlemen, if you find from the testimony that plaintiff, at the time and place mentioned in the complaint sustained any of the injuries set out in the complaint, and that such injury or injuries were not caused by, or were not the result of plaintiff's own negligence, you will next consider and determine the nature and extent of said injuries so sustained.

I have already stated to you that the defendant in its answer denies that the injuries so sustained by the plaintiff were of either the nature or the extent as set out in the complaint. This is a point for you, the jury, to determine—the nature and extent of the injuries, and in this connection, the burden of proof is upon the plaintiff to show by a preponderance of the evidence that the injuries, defects and afflictions of which he complains, or some of them are the proximate result of said accident. All of the injuries, defects and afflictions for which you award damages to the plaintiff, if you award damages, must by a preponderance of the evidence be shown to have been sustained as a natural and proximate result of said accident; and, of course, plaintiff cannot recover for any injuries other than those shown to have been sustained at the time and place mentioned in the complaint.

Before I proceed further, gentlemen, I perhaps should state that if the plaintiff has sustained the injuries under the conditions which I have heretofore stated, while in the service of the employer, and that it was due to a condition or conditions of such service or employment, the question as to whether or not the employer—the company—was negligent is not a material question in this case, because if the injuries, or some of them, were so received under such circumstances, and if the plaintiff himself was not guilty of negligence, then, as I have heretofore told you, the defendant is liable notwithstanding the fact that the defendant—the company—was guilty of no fault or negligence whatever.

As above stated, you are made the sole judges as to the extent or degree of the injuries, if any, so sustained: that is, as to whether or not they are permanent in character; and as to what extent, if any, by reason of such injuries, plaintiff has suffered mental  
213 or physical pain and anguish, or both; also as to what extent, if any, he has been, by reason of such injuries, disfigured, scarred, crippled, and to what extent, if at all, by reason of such injuries so sustained he has been disabled and incapacitated from following his usual vocation as described in the complaint, and

from performing any manual labor requiring the use of his left hand and of the several fingers and thumb thereof, or any of them; and as to whether or not this incapacitation, if any, is permanent or merely temporary. All of these points, gentlemen, go to make up the nature and extent of the plaintiff's alleged injuries, and should you award the plaintiff damages in any amount, it is your duty to consider each and every one of these points as a factor in computing the award. If you award damages to the plaintiff in this case, in addition to the factors that I have just mentioned, you will also make due and adequate allowance for the reasonable value of time lost by the plaintiff as a result of said injury or injuries from December 28th, 1914, to this date. I say, that, in addition to the other compensation.

In the ascertainment of damages the law does not lay down any definite, mathematical rule. It says that you, the jury, must be governed by sound sense and good judgment, and make such award of damages, if any, as would be just compensation. The testimony in this case shows that the plaintiff is now fifty-one years of age, and testimony has been received for the purpose of showing that the probable duration of the life of a person fifty-one years of age is 20.2 years. This testimony was based upon the American Mortality Tables, which are framed upon the basis of the average duration of the lives of a great number of persons, but it has been held that the rules to be derived from such tables may not be the absolute guides of the judgment and conscience of a jury in a case of this character. It may, however, be considered by you in connection with all the other evidence in the case. As above stated, if you find for the plaintiff, you should award a fair and reasonable compensation, taking into consideration what the plaintiff's income would probably have been, how long it would have lasted,—his condition of health, and all the contingencies to which it was liable; such award or compensation not to exceed in any event the amount claimed in plaintiff's complaint.

The court instructs you that if you find that plaintiff is entitled to recover in this action, the amount of recovery, if any, is for you to determine from all the facts in the case. Of course, you cannot measure in dollars and cents the exact amount to which he is entitled, if any, but it is for you to say in the exercise of a sound discretion, from all the facts in the case, after considering and weighing all the evidence produced before you, without fear and without favor, and without passion and prejudice, what amount of money would reasonably recompensate him for the damages, if any, he has sustained.

If you find for the plaintiff in this case, under the instructions given by the court, and that the plaintiff has sustained damages as set forth in his petition or complaint, then to enable you to estimate the amount of damage, it is not necessary that any witness should have expressed an opinion as to the amount of such damage,  
214 but the jury may themselves make such estimate from the facts and circumstances in proof, and by considering them in connection with their knowledge, observations and experience in the ordinary, everyday affairs of life.

If, under all the facts in this case and the law as I have stated it to you, you come to the conclusion that the plaintiff is entitled to recover some amount as compensation for the injuries he has sustained, if he has sustained any, you must not render what is known as a "quotient verdict"—that is, you must not add together the amount of the sums which each of you believe the plaintiff is entitled to, and divide by twelve, or any other number. Such or any similar method of arriving at plaintiff's compensation, would be unlawful, and the court would be compelled to set aside the verdict.

Now, gentlemen, you have heard all the facts in this case and the argument of counsel, and it is for you to pass upon the facts under the instructions which I have given you. If you find for the plaintiff the form of your verdict will be: "We, the jury, duly empanelled and sworn in the above entitled action, upon our oaths, do find for the plaintiff and assess his damages at — Dollars," inserting the amount which you determine should be awarded to him. If you find for the defendant, the form of your verdict will simply be: "we, the jury, duly empanelled and sworn in the above entitled cause, upon our oaths, do find for the defendant." Cause your foreman to sign the verdict which represents your conclusions and return it into court.

Mr. Kearney: I have none.

The Court: Any exceptions on the part of the defendant?

Mr. McFarland: Will the court allow us an exception?

The Court: Yes.

Mr. McFarland: Now, will your Honor furnish me with the draft of the instructions asked by the defendant and refused?

The Court: You may have an exception to all requested instructions.

Mr. McFarland: I will have to list them in some way so that they can be identified. Our instructions number, 1, 2, 3, 4, 5, 6, 7—

The Court: If you will just give me an opportunity to answer your question.

Mr. McFarland: Yes sir.

The Court: I say you may have an exception to the refusal of the court to give any of the requested instructions on behalf  
215 of the defendant—any that may have been refused.

Mr. McFarland: Now, may the record show that in the presence of the court and before the jury retired to consider of their verdict that these instructions were requested and denied, and exceptions were duly taken by the defendant.

The Court: Yes, the record may so show.

Mr. McFarland: Also as to the other instruction I asked the court to charge the jury.

The Court: You may have an exception to that also.

Mr. McFarland: The rules of the Supreme Court require that shall be done.

The Court: Yes, I realize that the rules do require that, and you may have an exception.

(The jury retired in charge of a bailiff, duly sworn, to consider of their verdict.)

*Certificate.*

I, H. C. Nixon, do hereby certify that I was present at the trial of the foregoing case, on Wednesday, Nov. 24th, Friday, Nov. 26th and Saturday, Nov. 27th; that I took down in shorthand all the testimony introduced and proceedings had during the course of the said trial; that I have transcribed said shorthand notes into typewriting, and that the foregoing one hundred and seventy-eight pages of typewritten matter contain a full, true and correct transcript of the shorthand notes so taken by me, and all the oral testimony of the various witnesses; all offers of documentary evidence, offers of proof, objections and exceptions made or taken by counsel; and all remarks, rulings and instructions given or rendered by the presiding judge, during the trial of the above-entitled case

Dated at Tucson, December 21st, 1915.

H. C. NIXON,  
*Court Reporter.*

216 And the foregoing was all the evidence given, introduced, heard and exhibited at the trial of said cause.

Be it further remembered, that during the trial of this cause the following proceedings among others were had:

I.

Joseph B. Hammer being on the witness stand and having duly sworn as a witness for the plaintiff was asked by plaintiff's counsel the followin- question:

P. 10:

"Q. In the vocation which you follow, as a boiler-maker and iron-worker, what wages do they pay you a day?"

"A. It was fifty cents an hour up to the time they made the reduction, and they brought us down to \$3.60; forty-five cents an hour."

"Q. Well, before this at other places, did you receive that much wages or more?"

To which last said question witness was permitted over defendant's objection to answer:

"I received more."

Defendant objected to said question before said witness answered, upon the ground that what wages plaintiff received at places other than where he was working at the time of his alleged injury, is wholly incompetent, irrelevant and immaterial, for the reason that it does not in a proper manner states or tend to fix the standard of plaintiff's earning capacity. That the court overruled defendant's objection to said question to which ruling of the court, defendant then and there excepted and still excepts, which said exception was allowed.



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## II.

Joseph B. Hammer being on the witness stand and having been duly sworn as a witness for the plaintiff was asked by plaintiff's counsel the following question:

P. 12:

"Q. What are the prevailing wages, say in Greenlee County at the present time for the class of work that you were performing at the time you were injured."

To which question said witness was permitted over defendant's objection to answer:

"A. The prevailing rate, the scale, as the boiler-makers call it, is \$4.72 for eight hours. I also know of one instance where a man is getting \$4.80."

Defendant objected to said question before said witness answered upon the ground that the particular wage scale in Greenlee County at the present time is wholly incompetent, irrelevant and immaterial, for the reason that it does not in a proper manner state or tend to fix the standard of plaintiff's earning capacity. That the court overruled defendant's objection to said question, to which ruling of the court, defendant then and there excepted and still excepts, which said exception was allowed.

## III.

Estanislado Provencio being on the witness stand and having been duly sworn as a witness for the defendant, was asked by plaintiff's counsel on cross-examination the following questions:

P. 95-96:

"Q. Then if the door there, as it should have been, was properly closed, that car would have passed over where Mr. Hammer was at work without injuring him any—wouldn't have burned him, because no calcine would have poured down; isn't that true?"

"Q. If the slide-doors on that car had been closed, the car would have passed over where Mr. Hammer was at work and wouldn't have burned him any?"

218 To which last said question witness was permitted over defendant's objection to answer:

P. 96:

"A. No sir."

"Q. If the slide-doors on that car that let the calcine out had been closed, then that car would have passed over the hopper where Mr. Hammer was at work and none of the calcine would have emptied into that hopper?"

"A. But the doors were closed."

"The Court: That isn't an answer to the question, if the doors had been closed would the calcine have been dropped out, run out?"

To which question said witness was permitted over defendant's objection to answer:



"A. No, it wouldn't have leaked out."

Defendant objected to said questions before said witness answered for the reason that evidence as to whether the door on the car was opened or closed was incompetent, irrelevant and immaterial for the reason that in attempting to show that the door on the car was open, plaintiff attempted to fix negligence in the premises, upon this defendant. Plaintiff's cause of action was solely predicated upon the Employers' Liability Act of this State, and for an injury which arose out of the condition or conditions of the employment, while he was engaged in a particular employment in which he had hired, in which evidence the question of the negligence of the employer or the defendant herein is wholly incompetent, irrelevant and immaterial.

#### IV.

George W. Fraser being on the witness stand (p. 102-104) and having been duly sworn as a witness for the defendant testified to and regarding a certain blue print map, which defendant presented and had marked for identification by the Clerk as defendant's exhibit —, which said blue print map this defendant then offered in evidence, to the introduction of which said map, plaintiff then objected, which said objection was by the court sustained, to which ruling of the court defendant then and there excepted and still excepts, which said exception was allowed.

That the purpose of the introduction of said map was to show exactly and in detail by the drawings thereon, the site and location of the place at defendant's smelter where plaintiff alleges he was injured.

Defendant offered to prove by said witness who was then able, willing and ready to so testify, that said blue print map was correct in all details pertaining to this cause.

#### V.

Elmer Bentley being on the witness stand and having been duly sworn as a witness for the plaintiff in rebuttal was asked by plaintiff's counsel the following questions:

P. 160:

"Q. Mr. Bentley, do you know Mauro Provencio, the young fellow that testified he was a helper to Mr. Hammer at the time he was injured?"

"A. Yes sir."

"Q. Immediately after Mr. Hammer's injury did you have any conversation with him as to why the boy operating the car did not stop the car before it ran over the hopper?"

To which said question said witness was permitted over defendant's objection to answer:

"A. I did. Yes sir."

"Q. What did he say?"

"A. He said——

"The Court: Now you will have to put the same question to him that you put to the other witness."

220 "Q. Did you then state, or did you then ask this Mauro Provencio a question similar to this: 'What was the matter with the fellow (referring to the motorman) that he didn't stop the car?'"

To which last said question witness was permitted over defendant's objection to answer:

"A. I did."

"Q. And did he not then say to you——

"The Court: Did he or not then say to you——

Mr. Curley:

"Q. The brakes wouldn't work, the fellow said," of words of that import?

To which last said question said witness was permitted over defendant's objection to answer:

"A. He did: He says the brakes was no good."

"The Court: The latter part of his answer is stricken out."

"His answer he did, is allowed to stand. The objection is overruled."

That defendant objected to said question before said witness answered in each case, upon the ground that plaintiff's cause of action was solely predicated upon the Employers' Liability Act of this State and restricted solely to a recovery for injuries due to an accident due to a condition or conditions of plaintiff's occupation as defined in said act. That said questions and answers sought to charge this defendant with negligence in the operation of the car, and with negligence in furnishing proper appliances in proper condition a safe place to work, for which reason said evidence was incompetent, irrelevant and immaterial.

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## VI.

That upon motion of plaintiff (p. 24-26) and over the objection of this defendant, plaintiff was permitted by the court to amend his complaint, by adding thereto an additional injury and result to plaintiff on account of his alleged injury, of injury and damage to the stomach of plaintiff. That the court overruled the objection of defendant to such amendment, to which ruling of the court the defendant then and there excepted and still excepts, which said exception was allowed.

That said application and motion to amend plaintiff's complaint in the particular above mentioned, was not made or suggested until the trial of the cause had begun, and coming at such time came too late.

## VII.

That at the conclusion of all the evidence in the case, (p. 171) and before the court had instructed the jury and before the jury had retired to consider of their verdict, the defendant moved the

court that a verdict be directed in behalf of this defendant on the following grounds:

First. Because the evidence submitted would not sustain a verdict or support a judgment in the case.

Second. Because the evidence in the cause, in fact, all of the evidence in the cause, shows that if the plaintiff received any injury at the day and date alleged in his complaint, that such injury was the result directly and proximately of his own negligence.

Third. Because the evidence in the cause shows by an overwhelming preponderance that a verdict on the cause of action as alleged in the complaint should be for the defendant.

That the court overruled and denied defendant's said motion for a directed verdict, to which ruling of the court, defendant then and there excepted and still excepts, which said exception was allowed.

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## VIII.

That the defendant requested in writing and the court refused to give to the jury the following instructions:

"If the jury believe from the evidence that plaintiff was instructed by defendant that the proper and safe method to place the angle irons on the top of the hopper or hoppers was to place same from the top of the feed floor and that plaintiff failed and refused to pursue the method directed by defendant and voluntarily adopted the method of placing said angle irons by getting down into the hopper, and the method selected by him in any way caused or contributed to the accident and injury as alleged in his complaint, then I charge you plaintiff cannot recover."

To which action of the court, in the presence of the court and before the jury retired to consider of their verdict, defendant then and there excepted and still excepts upon the ground that in an action brought under Employers' Liability Act, contributory negligence of a plaintiff employee, which in any degree contributes to the accident and injury on which said plaintiff employee seeks recovery, is a bar to such recovery; and that the court should have so stated the law to the jury.

## IX.

That the defendant requested in writing and the Court refused to give to the jury the following instruction:

"The law imposes upon every person the duty of using ordinary care for his own personal protection against injury; this is what the courts mean when they say contributory negligence will defeat a recovery."

To which action of the court, in the presence of the court and before the jury retired to consider of their verdict, defendant then and there excepted and still excepts upon the ground that in an action brought under Employers' Liability Act, contributory negligence of a plaintiff employee, which in any degree contributes to the accident and injury on which such plaintiff employee seeks recovery, is a bar to such recovery; and that the court should have so stated the law to the jury.

## X.

That the defendant requested in writing and the Court refused to give to the jury the following instruction:

"I charge you that what the law means by "Contributory Negligence" is a want of ordinary care on the part of the person injured, which contributed in any degree to the injury, and without which the injury would not have happened, and that such act or omission was not such an one as would have been done or omitted by a person of ordinary prudence under the same or like circumstances, than I instruct you, that the plaintiff cannot recover and your verdict should be for the defendant."

To which action of the court, in the presence of the court and before the jury retired to consider of their verdict, defendant then and there excepted and still excepts upon the ground that in an action brought under Employers' Liability Act, contributory negligence of a plaintiff employee, which in any degree contributes to the accident and injury on which such plaintiff employee seeks recovery, is a bar to such recover-; and that the court should have so stated the law to the jury.

## XI.

That the defendant requested in writing and the Court refused to give to the jury the following instruction:

"You are further instructed that the law under which this action is brought bases the liability of the defendant for damages solely upon the fact that the accident and resulting injury were due to a condition or conditions of a hazardous occupation of an employee in the service of such employer in such hazardous occupation. If you are satisfied from the evidence in the cause that the accident and resulting injury were due to a condition or conditions of such occupation, while plaintiff was in the service of defendant in such hazardous occupation, yet plaintiff would not be entitled to recover in this action in such a situation unless the evidence in the cause further satisfies you that said accident and injury were not due in any degree to the negligence of the plaintiff."

To which action of the court, in the presence of the court, and before the jury retired to consider of their verdict, defendant  
224 then and there excepted and still excepts upon the ground that in an action brought under Employers' Liability Act, contributory negligence of a plaintiff employee, which in any degree contributes to the accident and injury on which such plaintiff employee seeks recovery, is a bar to such recovery; and that the court should have so stated the law to the jury.

Be it remembered that during the trial of this cause the further proceedings were had:

L. Kearney, Esq., attorney for plaintiff herein, in his closing argument before the jury and while discussing the evidence in the cause said, even if Hammer had remained in the hopper and refused to get out as claimed by the defendant, nevertheless, Hammer

would not have been injured if the car had been in proper condition and if it had not been for the negligence of the defendant in running the car over the hopper and spilling the calcine on him, or words to that purport and effect. To which remarks of counsel defendant then and there objected.

That the court erred in refusing to withdraw said remarks from the jury or in refusing to admonish the jury to disregard said remarks. To which action of the court, defendant then and there excepted, which exception was allowed by the court.

That defendant objected to the foregoing remarks and conduct on the part of counsel for plaintiff upon the ground that in an action of this character under said Employers' Liability Act brought for injuries received, the negligence of the defendant is not an issue and that the only recovery which may be had by a plaintiff employee under said act, is for injury or injuries received, due to any accident arising out of and in the course of the labor, service  
225 and — of such plaintiff employee, and due to a condition or conditions of such occupation or employment; and upon the further ground that at the time the issues in this cause were joined, plaintiff avowed in open court that the recovery sought herein by plaintiff, was one by virtue of the provisions of said Employers' Liability Act, and not one by virtue of the general law for negligence of the defendant in the premises.

Respectfully submitted,

W. C. McFARLAND,  
H. A. ELLIOTT,  
*Attorneys for Defendant.*

Settled and allowed this 4th day of March, 1916.

W. H. SAWTELLE, *Judge.*

Endorsements: In the United States District Court in and for the District of Arizona. Joseph B. Hammer, Plaintiff, vs. The Arizona Copper Company, Limited, a corporation, Defendant. No 39 Tucson. Defendant's Proposed Bill of Exceptions. Filed this 4th day of March, A. D. 1916. Mose Drachman, Clerk, by Effie D. Botts, Deputy Clerk. Received copy of within Defendant's Proposed Bill of Exceptions, this 1st day of March, A. D., 1916. Frank E. Curley, Attorney for Plaintiff. W. C. McFarland, H. A. Elliott, Attorneys for Defendant, Clifton, Arizona.

226 In the United States District Court in and for the District of Arizona.

JOSEPH B. HAMMER, Plaintiff,

vs.

THE ARIZONA COPPER COMPANY, LIMITED (a Corporation), Defendant.

*Defendant's Proposed Bill of Exceptions.*

Be it remembered, that heretofore, to-wit: on the 8th day of January, 1916, and within the time allowed by law and rule of court, defendant above named, presented, served and filed its petition for new trial of the above entitled cause, and among other grounds for said petition represented as follows:

That defendant was surprised during the course of the trial herein by the testimony of Joseph Hammer, the plaintiff, and Elmer Bentley, a witness called by said plaintiff, in this; viz:

That said plaintiff and said Bentley testified in behalf of plaintiff that it was impossible to place the angle irons in the hopper in which plaintiff was working at the time of his injury, by plaintiff's remaining on the feed floor above and about said hopper; that it was impossible to so place said angle irons from above said hoppers

by reaching down and within the same; that it was impossible  
227 to do the work plaintiff was instructed to do without going down into said hopper.

That this defendant did not and could not anticipate that plaintiff and the said Bentley would so testify. That defendant could not within a reasonable time prior to the trial of this cause, if it had anticipated such testimony, have prepared to meet, contradict or ascertain the truth of such testimony for the following reasons:— That from and after the 11th day of September, 1915, and continuously to the present time, a strike has been and now is in progress in the District wherein defendant operates its smelter, whereat plaintiff sustained his injuries and that by reason of said strike, defendant has been compelled to shut down and cease operations in its said smelter; which said condition has continued from said 11th day of September, 1915. Defendant was compelled for the safety of its property to give over and transfer its custody of the same, including said smelter, to the Sheriff of the County of Greenlee, State of Arizona. That during the times herein mentioned, defendant has not been permitted by persons striking against defendant and guarding and patrolling said smelter to employees or other agents in and upon said premises for the purpose of performing any work for defendant. That for this reason it was impossible for defendant within a reasonable time before the trial herein, to send any person or persons into said smelter for the purpose of ascertaining by actual experiment, if it were possible or impossible to put in place the angle iron on which plaintiff was working at the time of his injury, without going into the hopper. That it



would have been dangerous to the personal safety of any person or persons to have attempted such work and experiment at any time from said 11th day of September, 1915, to the day of the trial herein, and for a considerable time thereafter.

That on the 5th day of January, 1916, this defendant believing that conditions had so changed as to permit said work being accomplished and without danger to the workers, directed one George W. Fraser, A. B. Jones, and W. C. Marshall to go to said smelter, and perform the actual experiment of placing the same angle iron in the same hopper, used and worked in by the plaintiff at the time of his injury. That the said Fraser, Jones and Marshall on last said date went to said smelter and performed said experiment and work. That said Fraser, Jones and Marshall took said angle iron and put the same in place in said hopper, without at any time going down and into said hopper; that they and each of them remained upon said feed floor and put said angle iron in place from above said hopper; that the result of said work so done was workmanlike, and in full compliance with the instruction plaintiff has testified as given him by his foreman upon undertaking said work. That should this motion be granted the said Fraser, Jones and Marshall will testify to the above facts and will be and appear upon due notice at any trial of the cause, and give such testimony, and testify that it is possible to place such angle iron in such hopper, without going into the hopper at all and that the same can be so done as to make a workmanlike job, and give a tight fit, as claimed to be required by said plaintiff, and will further testify that they and each of them have in person so done such work, using the angle iron and hopper used by plaintiff at the time of his injury.

229 That defendant files herewith, photographs and sworn affidavits of George W. Fraser, A. B. Jones and W. C. Marshall in support of the foregoing statements.

That the defendant has come into possession of, and in event this petition is granted, will be able to produce and will produce newly discovered evidence since the trial of this action and material to defendant, and which defendant could not with reasonable diligence have discovered and produced at said trial. That prior to said trial this defendant used every available means to discover all witnesses to the accident and injury of this plaintiff and sought out and interviewed all persons having such information and knowledge known to this defendant; that said newly discovered evidence is supported by the affidavit filed herewith of George W. Fraser, general foreman of repairs of this defendant at its smelter, and is as follows:

(a) That one T. M. Vaughn of the Town of Clifton, County of Greenlee, State of Arizona, is prepared to testify and will testify upon any trial or re-trial of this cause, that he, on the evening of the day on which plaintiff received his injuries, had a conversation with Elmer Bentley who was called as a witness for the plaintiff on the trial herein, in which conversation the said Bentley stated to the said Vaughn that a man had got badly burned at the smelter on that day, saying that the man so injured was Hammer the plain-



tiff herein and that the said Bentley further stated to the said Vaughan that the damned old fool (meaning Hammer) was told to get out and that he, the said Hammer refused to get out on account of its being a tight place and hard to get out of and into.

230 (b) That Elizabeth Vaughan, wife of the said T. M. Vaughan was present at the said conversation between the said T. M. Vaughn and the said Elmer Bentley, referred to and described in paragraph (a) immediately preceding. That the said Elizabeth Vaughan is prepared to testify and will testify at any further trial or re-trial of this cause to the facts and statements of said conversation hereinabove mentioned.

(c) That one Estanislado Sierra is prepared to testify and will testify upon a further trial or re-trial of this cause that upon the day of Plaintiff's injury he was a helper of the said Elmer Bentley a witness called on behalf of plaintiff at the trial herein and that as such helper he was working for this defendant on the top of No. 1 furnace immediately below the feed floor and below the hopper in which plaintiff was working at the time of his injury, and that at such place and while so working, said Estanislado Sierra heard the helper assisting the plaintiff herein say to plaintiff "get out of there Joe, the car is coming" and that the plaintiff herein replied to said helper, "Tell him to come on." That the said Estanislado Sierra then saw the said plaintiff raise his hand and make a motion to his helper for the car to come on.

(d) That one Harry Neilson is prepared to testify and will testify upon a further trial or re-trial of this cause that he on the day of the injury to plaintiff was foreman of repairs in the employ of this defendant at its smelter near the Town of Clifton, County of Greenlee, State of Arizona; that at the time of the injury to this plaintiff he, the said Harry Neilson was standing back of No. 1 furnace with Elmer Bentley a witness called by the plaintiff at  
231 the trial herein; that at such time and place said Harry Neilson and the said Bentley were discussing the work for the day and that neither said Harry Neilson nor the said Bentley had any knowledge of any injury to or of the imminence of any danger to the said plaintiff until they heard plaintiff call for help; that the said Neilson will further testify that the said Bentley could not honestly and truthfully testify that the car which ran over the hopper in which Hammer was injured did not stop after it came upon the feed floor, and before it passed over said hopper for the reason that the said Bentley at such time as the car was passing over and along said feed floor and over said hopper was engaged in said conversation with said Neilson and was paying no attention to what was going on upon said feed floor. That the said Harry Neilson will further testify that the helper of Hammer was the first man to get to and assist Hammer after his injury, out of the hopper in which he was working and that the said Hammer the plaintiff herein was out of hopper and lying on the feed floor when the said Bentley first got to him after plaintiff's injury and that the said

Bentley said to said Neilson after the injury to the said Hammer, "I don't see how he ever got out. When I got upon the feed floor I thought the car had run over old Joe, the way he was laying on the feed floor."

That defendant herewith files affidavits of the said new witnesses, T. M. Vaughan, Elizabeth Vaughan, Estanislado Sierra and Harry Neilson, to the effect that they and each of them will give the testimony herein represented.

232 Be it further remembered, that together with the presentation and filing of said petition for new trial to sustain the issues thereof, on the part of defendant, the following affidavits were presented and filed:

In the United States District Court for the District of Arizona.

JOSEPH B. HAMMER, Plaintiff,

vs.

THE ARIZONA COPPER COMPANY, LIMITED (a Corporation), Defendant.

*Affidavit.*

T. M. Vaughan, being by me first duly sworn according to law on oath deposes and says:

That he now is and has been for more than two and one-half (2½) years last past, a resident of the Town of Clifton, County of Greenlee, State of Arizona; that he is well acquainted with and has known for the two years last past, Elmer Bentley of the said Town of Clifton; that this affiant and said Elmer Bentley during the year 1914 were close neighbors residing in what is known as "North Clifton" in said Town of Clifton; that affiant knows said

233 Elmer Bentley was during said year 1914 and for some time thereafter, in the employ of The Arizona Copper Company, Limited, as a repairman at said Company's New Smelter, situate near the said Town of Clifton; that this affiant knows Joseph B. Hammer, the defendant above named; that affiant knows of said Joseph B. Hammer's having been injured at said New Smelter by sustaining certain burns, and that on the evening of the day on which the said Joseph B. Hammer sustained said injury, the said Elmer Bentley came to the home of this affiant in said North Clifton and talked with affiant concerning the said injury of the said Hammer; that the said Bentley at last said time and place said to affiant, referring to said injury of said Hammer, "There was a man got badly burned out at the Smelter today"; that affiant asked the said Bentley how it happened and he started in to explain that it was done by hot calcine, and that he (meaning the said Hammer) was repairing a hopper under the track. He (Bentley) said the damned old fool was told to get out and he (meaning the said Hammer) refused to get out on account of its being a tight place

and hard to get out of and into; that said Elmer Bentley told affiant at said time and place that the man so hurt and injured was Joseph B. Hammer, a boilermaker working at said New Smelter; that the said conversation with the said Elmer Bentley took place in the presence of Elizabeth Vaughan, wife of this affiant, further affiant saith not.

T. M. VAUGHAN.

Subscribed and sworn to before me this 4th day of January, A. D., 1916.

[NOTORIAL SEAL.]

WALTER B. FOOTE,  
*Notary Public in and for the County  
of Greenlee, State of Arizona.*

My Commission expires Dec. 31, 1916.

234 In the United States District Court for the District of Arizona.

JOSEPH B. HAMMER, Plaintiff,

vs.

THE ARIZONA COPPER COMPANY, LIMITED (a Corporation), Defendant.

*Affidavit.*

Elizabeth Vaughan, being by me first duly sworn according to law on oath deposes and says:

That she is the wife of T. M. Vaughan, and that she now is and has been for more than two and one-half (2½) years last past, a resident of the Town of Clifton, County of Greenlee, State of Arizona; that she is acquainted with and has known for some time past, Elmer Bentley of the said Town of Clifton; that this affiant and her said husband, T. M. Vaughan and said Elmer Bentley during the year 1914 were close neighbors residing in what is known as "North Clifton" in said Town of Clifton; that affiant knows said Elmer Bentley was during said year 1914 and for some time thereafter, in the employ of The Arizona Copper Company, Limited, as a repairman at said company's New Smelter, situate near the said Town of Clifton; that this affiant knows who Joseph B. Hammer is, the defendant above named; that affiant knows of said Joseph B. Hammer's having been injured at said New Smelter by sustaining certain burns, and that on the evening of the day on which the said Joseph B. Hammer sustained said injury, the said

235 Elmer Bentley came to the home of this affiant and her said husband in said North Clifton and talked with her said husband in the presence of this affiant concerning the said injury of the said Hammer; that the said Bentley at last said time and place and in the presence of affiant and her said husband, referring to said injury of said Hammer. "There was a man got badly burned out at the Smelter today." That affiant's said husband

asked the said Bentley how it happened and he started in to explain that it was done by hot calcine, and that he (meaning the said Hammer) was repairing a hopper under the track. He (Bentley) said the damned old fool was told to get out and he (meaning the said Hammer) refused to get out on account of its being a tight place and hard to get out of and into; that said Elmer Bentley said in the presence of affiant at said time and place that the man so hurt and injured was Joseph B. Hammer, a boilermaker working at said New Smelter; that the said conversation with the said Elmer Bentley took place in the presence of this affiant and her husband, the said T. M. Vaughan, further affiant saith not.

ELIZABETH VAUGHAN.

Subscribed and sworn to before me this 6th day of January, A. D., 1916.

[NOTORIAL SEAL.]

WALTER B. FOOTE,  
*Notary Public in and for the County  
of Greenlee, State of Arizona.*

My Commission expires Dec. 31, 1916.

236 In the District Court of the United States for the District of Arizona.

JOSEPH B. HAMMER, Plaintiff,

vs.

THE ARIZONA COPPER COMPANY, LIMITED (a Corporation), Defendant.

*Affidavit.*

W. C. Marshall, being by me first duly sworn according to law on oath deposes and says:

That he is fifty-six (56) years of age; is now and has been for twelve (12) years last past a resident of the Town of Clifton, County of Greenlee, State of Arizona; that for eight (8) months prior to the 11th day of September, 1915, he was in the employ of the Arizona Copper Company, Limited, the defendant above named, at its New Smelter, in the capacity of mechanic in general repairs, in and about said Smelter.

That on the 5th day of January, 1916, affiant in company with George W. Fraser, A. B. Jones, and Charlie Bond, at the request of The Arizona Copper Company, Limited, went to the said Smelter of said defendant, situate in the said Town of Clifton and at said Smelter went to that particular hopper situate on the south end of No. 1 furnace, between the rails of the west broad gauge track; that at last named point affiant assisted the said Jones and the said Fraser in placing in position angle irons on the south and north sides of said hopper, by placing them on the top of the hopper and the bottom or under side of the feed floor, to cover a space

of two and one-fourth ( $2\frac{1}{4}$ ) inch hole between the top of said hopper and the under side of said feed floor; that the purpose and use of said angle iron are to prevent the overflow of  
 237 ore from the hopper when filled; that the method and practice used in placing each of said angle irons in the position described were as follows: That this affiant sitting upon the feed floor and at the edge of the hopper and just opposite the side of the hopper on which the angle iron was to be placed and allowing his feet to hang in said hopper, reached across the opening into said hopper and held suspended in his hands said angle iron on top of the hopper, below and up against the under side of the feed floor; that to hold said angle iron in place a hole is drilled through the feed floor and through the angle iron at either end and bolts inserted in the hole and held by a nut; that while this affiant was holding said angle iron beneath said feed floor as aforesaid, it was the practical act for said Jones working with this affiant to have marked the point for the holes to be drilled in the angle iron, through the holes previously drilled through the feed floor; the point for the holes having been marked on the angle iron, it was the practical act to remove said angle iron, and have the holes therein for the insertion of the bolts drilled at the points marked. That this affiant sitting as above described on the edge of the opening into said hopper held said angle iron as above described and inserted the bolts in the holes at either end of said angle iron up through said angle iron and said feed floor and that thereupon the said Jones assisting this affiant screwed down the nuts. That said angle iron, bolts and nuts were then ready to be tightened into position; that the act hereinabove described was then reversed and performed upon  
 238 the other or north side of said hopper; that at no time in the operation of placing either of said angle irons in position, was it necessary for this affiant or any person assisting him to get down into said hopper other than allowing his feet to hang therein while sitting on the feed floor as herein above described; that the result obtained by this method was a workmanlike job and resulted in the fitting of the angle irons tight enough to answer the purpose required.

That this affiant will present himself upon due notice at any hearing or trial in the above entitled cause and that he will give as testimony in such hearing or trial the statements herein contained.

And further affiant saith not.

W. C. MARSHALL.

Subscribed and sworn to before me this 6th day of January, A. D., 1916.

[NOTORIAL SEAL.]

WALTER B. FOOTE,  
*Notary Public in and for the County  
 of Greenlee, State of Arizona.*

My Commission expires Dec. 31, 1916.

In the District Court of the United States for the District of Arizona.

JOSEPH B. HAMMER, Plaintiff,

vs.

THE ARIZONA COPPER COMPANY, LIMITED (a Corporation), Defendant.

*Affidavit.*

A. B. Jones, being by me first duly sworn according to law on oath deposes and says:

239 That he is forty-two (42) years of age; is now and has been for about two (2) years last past a resident of the Town of Clifton, County of Greenlee, State of Arizona, that for about seven (7) months prior to the 11th day of September, 1915, he was in the employ of The Arizona Copper Company, Limited, the defendant above named, at its New Smelter, in the capacity of General Reverberatory foreman in and about said Smelter.

That on the 5th day of January 1916, affiant in company with George W. Fraser, W. G. Marshall and Charlie Bond, at the request of The Arizona Copper Company, Limited, went to the said Smelter of said defendant, situate in the said Town of Clifton, and at said Smelter went to that particular hopper situate on the south end of No. 1 furnace, between the rails of the west broad gauge track, being the hopper on said furnace on which Joseph B. Hammer, the plaintiff above named was working when he was injured at said Smelter, on or about the 28th day of December, 1914; that at last named point affiant worked with the said Marshall and the said Fraser in placing in position angle irons on the south and north sides of said hopper, by placing them on the top of the hopper and the bottom or under side of the feed floor, to cover a space of two and one-fourth ( $2\frac{1}{4}$ ) inch hole between the top of said hopper and the under side of said feed floor; that the purpose and use of said angle iron are to prevent the overflow of ore from the hopper when filled; that the method and practice used in placing each of said angle irons in the position described were as follows: That said Marshall sitting upon the feed floor and at the edge of the hopper and just opposite the side of the hopper on which the angle iron was to be placed and with his feet in the said hopper,

240 reached across the opening into said hopper and held suspended in his hands said angle iron on top of the hopper, below and up against the under side of the feed floor; that to hold said angle iron in place a hole is drilled through the feed floor and through the angle iron at either end and bolts inserted in the hole and held by a nut; that while said Marshall was holding said angle iron beneath said feed floor as aforesaid, it was the practical act for said affiant working with said Marshall to have marked the point for the holes to be drilled in the angle iron, through the holes previously drilled through the feed floor; the point for the holes having

been marked on the angle iron, it was the practical act to remove said angle iron and have the holes therein for the insertion of the bolts drilled at the points marked. That said Marshall sitting as above described on the edge of the opening into said hopper held said angle iron as above described and inserted the bolts in the holes at either end of said angle iron up through said angle iron and said feed floor and that thereupon this affiant screwed down the nuts. That said angle iron, bolts and nuts were then ready to be tightened into position; that the act hereinabove described was then reversed and performed upon the other or north side of said hopper; that at no time in the operation of placing either of said angle irons in position, was it necessary for this affiant or any person assisting him to get down into said hopper other than said Marshall having his feet therein while sitting on the feed floor as hereinabove described; that the result obtained by this method was a workman-like job and resulted in the fitting of the angle irons tight enough to answer the purpose required.

241 That this affiant will present himself upon due notice at any hearing or trial in the above entitled cause and that he will give as testimony in such hearing or trial the statements herein contained.

And further affiant saith not.

A. B. JONES.

Subscribed and sworn to before me this 6th day of January, A. D., 1916.

[NOTARIAL SEAL.]

WALTER B. FOOTE,

*Notary Public in and for the County of Greenlee,*

*State of Arizona.*

My commission expires Dec. 31, 1916.

In the District Court of the United States for the District of Arizona.

JOSEPH B. HAMMER, Plaintiff,

vs.

THE ARIZONA COPPER COMPANY, LIMITED (a Corporation),  
Defendant.

*Affidavit.*

Charles Bond, being by me first duly sworn according to law on oath deposes and says:

That he is thirty-five (35) years of age; is now and has been for about eight (8) years last past a resident of the Town of Clifton, County of Greenlee, State of Arizona, that for about eight

242 (8) years prior to the date hereon, he was in the employ of The Arizona Copper Company, Limited, the defendant above named, at its engineering offices at said Town of Clifton, in the capacity of civil and mechanical engineer.



That on the 5th day of January, 1916, affiant in company with George W. Fraser, W. C. Marshall and A. B. Jones, at the request of The Arizona Copper Company, Limited, went to the smelter of said defendant, situate near the said Town of Clifton, and at said smelter went to that particular hopper situate on the south end of No. 1 furnace, between the rails of the west broad guage track; that at last named point watched the said Marshall and the said Fraser and the said Jones, place in position angle irons on the south and north sides of said hopper, by placing them on the top of the hopper and the bottom or under side of the feed floor, to cover a space of two and one-fourth ( $2\frac{1}{4}$ ) inch hole between the top of said hopper and the under side of said feed floor; that the purpose and use of said angle irons are to prevent the overflow of ore from the hopper when filled; that the method and practice used in placing each of said angle irons in the position described were as follows: That said Marshall sitting upon the feed floor and at the edge of the hopper and just opposite the side of the hopper on which the angle iron was to be placed and with his feet in the said hopper, reached across the opening into said hopper and held suspended in his hands said angle irons on top of the hopper, below and up against the under side of the feed floor; that to hold said angle iron in place a hole is drilled through the feed floor and through the angle iron at either end and bolts inserted in the hole and held by a nut; that while said Marshall was holding said angle iron beneath said feed

floor as aforesaid, it was the practical act for said Jones working with said Marshall to have marked the point for the holes to be drilled through the feed floor; the point for the holes having been marked on the angle iron, it was the practical act to remove said angle iron, and have the holes therein for the insertion of the bolts drilled at the points marked. That said Marshall sitting as above described on the edge of the opening into said hopper held said angle iron as above described and inserted the bolts in the holes at either end of said angle iron up through said angle iron and said feed floor and that thereupon said Jones screwed down the nuts. That said angle iron, bolts and nuts were then ready to be tightened into position; that the act hereinabove described was then reversed and performed upon the other or north side of said hopper; that at no time in the operation of placing either of said angle irons in position was it necessary for any person assisting therein to get down into said hopper other than said Marshall having his feet therein while sitting on the feed floor as hereinabove described; that the result obtained by this method was a workmanlike job and resulted in the fitting of the angle irons tight enough to answer the purpose required.

That this affiant will present himself upon due notice at any hearing or trial in the above entitled cause and that he will give as testimony in such hearing or trial the statements herein contained.

And further affiant saith not.

CHARLES BOND.

Subscribed and sworn to before me this 6th day of January, A. D., 1916.

[NOTARIAL SEAL.]

WALTER B. FOOTE,  
Notary Public in and for the County of  
Greenlee, State of Arizona.

My commission expires Dec. 31, 1916.

244 In the District Court of the United States for the District of Arizona.

JOSEPH B. HAMMER, Plaintiff,

vs.

THE ARIZONA COPPER COMPANY, LIMITED, a Corporation, Defendant.

*Affidavit.*

George W. Fraser, being by me first duly sworn according to law on oath deposes and says:

That he is fifty-two (52) years of age; is now and has been for thirty (30) years last past a resident of the Town of Clifton, County of Greenlee, State of Arizona; that for about thirty (30) years prior to the 11th day of September, 1915, he was in the employ of The Arizona Copper Company, Limited, the defendant above named, at the smelter of said company.

That on the 5th day of January, 1916, affiant in company with W. C. Marshall, A. B. Jones, and Charlie Bond, at the request of The Arizona Copper Company, Limited, went to the said smelter of said defendant, situate in the said Town of Clifton, and at said smelter went to that particular hopper situate on the south end of No. 1 furnace, between the rails of the west broad gauge track, being the hopper on said furnace on which Joseph B. Hammer the plaintiff above named was working when he was injured at said smelter, on or about the 28th day of December, 1914; that at last named point affiant assisted the said Jones and the said Marshall in placing in position angle irons on the south and north sides of said hopper, by placing them on the top of the hopper and the bottom or under side of the feed floor, to cover a space of two and one-fourth (2¼)

245 inch hole between the top of said hopper and the underside of said feed floor; that the purpose and use of said angle irons are to prevent the overflow of ore from the hopper when filled; that the method and practice used in placing each of said angle irons in the position described were as follows: That said Marshall sitting upon the feed floor and at the edge of the hopper and just opposite the side of the hopper on which the angle iron was to be placed and allowing his feet to hang in said hopper reached across the opening into said hopper and held suspended in his hands said angle iron on top of the hopper, below and up against the under side of the feed floor; that to hold said angle iron in place a hole is drilled through the feed floor and through the angle iron at either end and bolts inserted in the hole and held by a nut;

that while said Marshall was holding said angle iron beneath said feed floor as aforesaid, it was the practical act for said Jones working with said Marshall to have marked the point for the holes to be drilled in the angle iron, through the holes previously drilled through the feed floor; the point for the holes having been marked on the angle iron, it was the practical act to remove said angle iron, and have the holes therein for the insertion of the bolts drilled at the points marked. That said Marshall sitting as above described on the edge of the opening into said hopper held said angle iron as above described and inserted the bolts in the holes at either end of said angle iron up through said angle iron and said feed floor and that thereupon the said Jones screwed down the nuts. That said angle iron, bolts and nuts were then ready to be tightened into position: that the act hereinabove described was then reversed and performed upon the other or north side of said hopper; that at no time

246 in the operation of placing either of said angle irons in position, was it necessary for this affiant or any person assisting him to get down into said hopper other than said Marshall allowing his feet to hang therein while sitting on the feed floor as hereinabove described; that the result obtained by this method was a workmanlike job and resulted in the fitting of the angle irons tight enough to answer the purpose required.

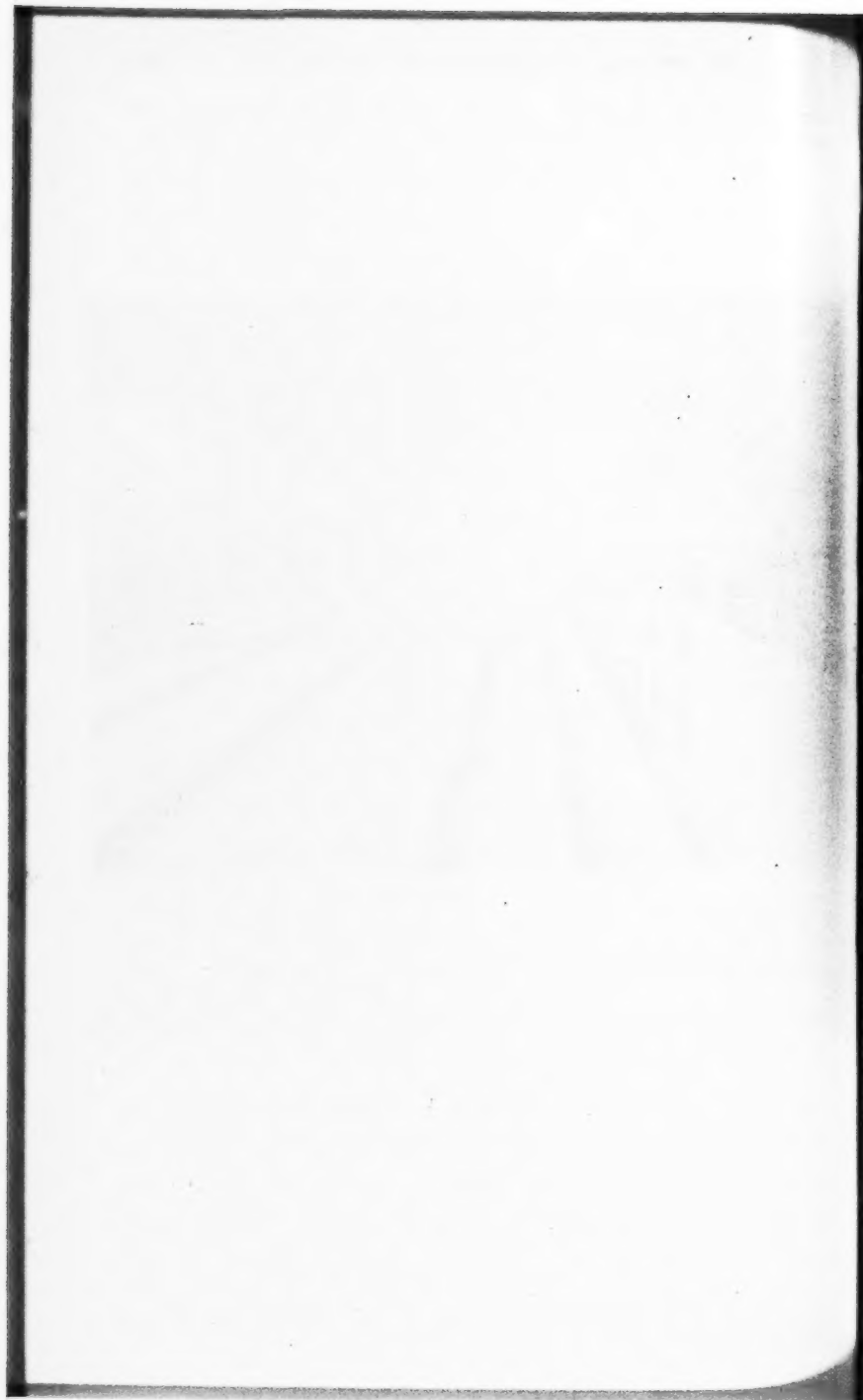
That the following and hereto attached four photographs marked Photograph No. 1, Photograph No. 2, Photograph No. 3, and Photograph No. 4, respectively, were taken at said smelter under my supervision and in my presence and in the presence also of said Marshall, Jones and Bond, and that said photographs are views of what is known as the feed floor or charge floor and the hoppers thereon and in particular of the hopper in which Joseph B. Hammer, the plaintiff above named was at work at the time he was injured on or about the 28th day of December, 1914. That said views are full, true and correct representations and reproductions of that part of said feed floor or charge floor of said smelter that is included within said views and each thereof. That said views or pictures or photographs were taken under my supervision by O. A. Risdon of said Town of Clifton; that I have examined each of said photographs and that each thereof is a full, true and correct reproduction of the things hereinbefore mentioned

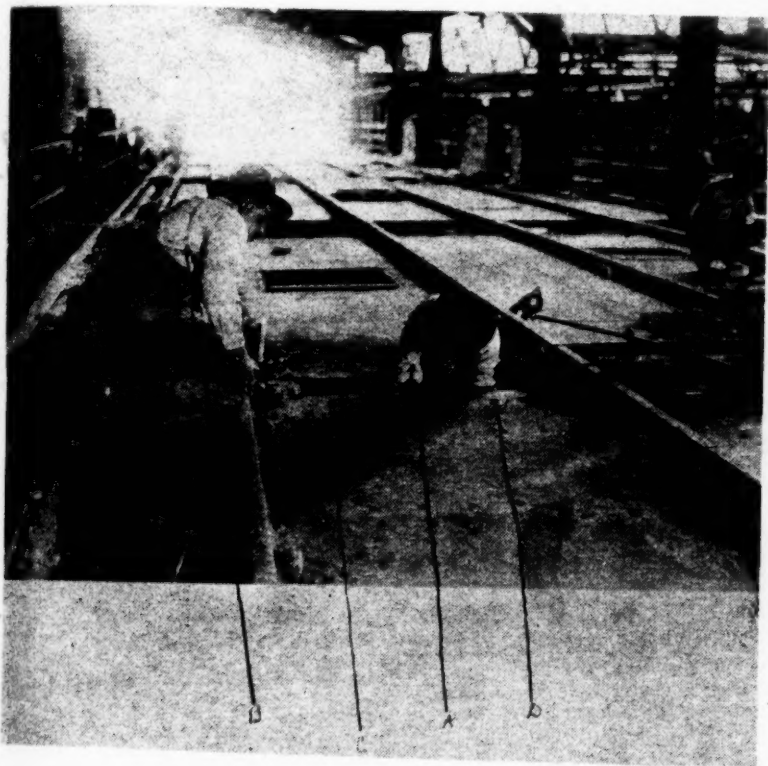
That view marked Photograph No. 1, is a picture of the feed floor or charge floor in said smelter and shows in particular the hopper in which Hammer was working at the time of his injury. Arrow A and arrow E indicate the rails of the broad  
247 guage track running north and south across said feed floor upon which was operated at the time of Hammer's injury, the calcine car. Arrow B indicates the hopper in which Hammer was working at said time. Arrow D, indicates the fettling track being a track running east and west of eighteen (18) inch guage at right angles to said broad guage track. That arrow C indicates the direction in which the calcine car came in over said broad guage tracks prior to and at the time of Hammer's said injury.

That view marked Photograph No. 2 is another view of said feed floor or charge floor and of said hopper. Arrow A indicates said

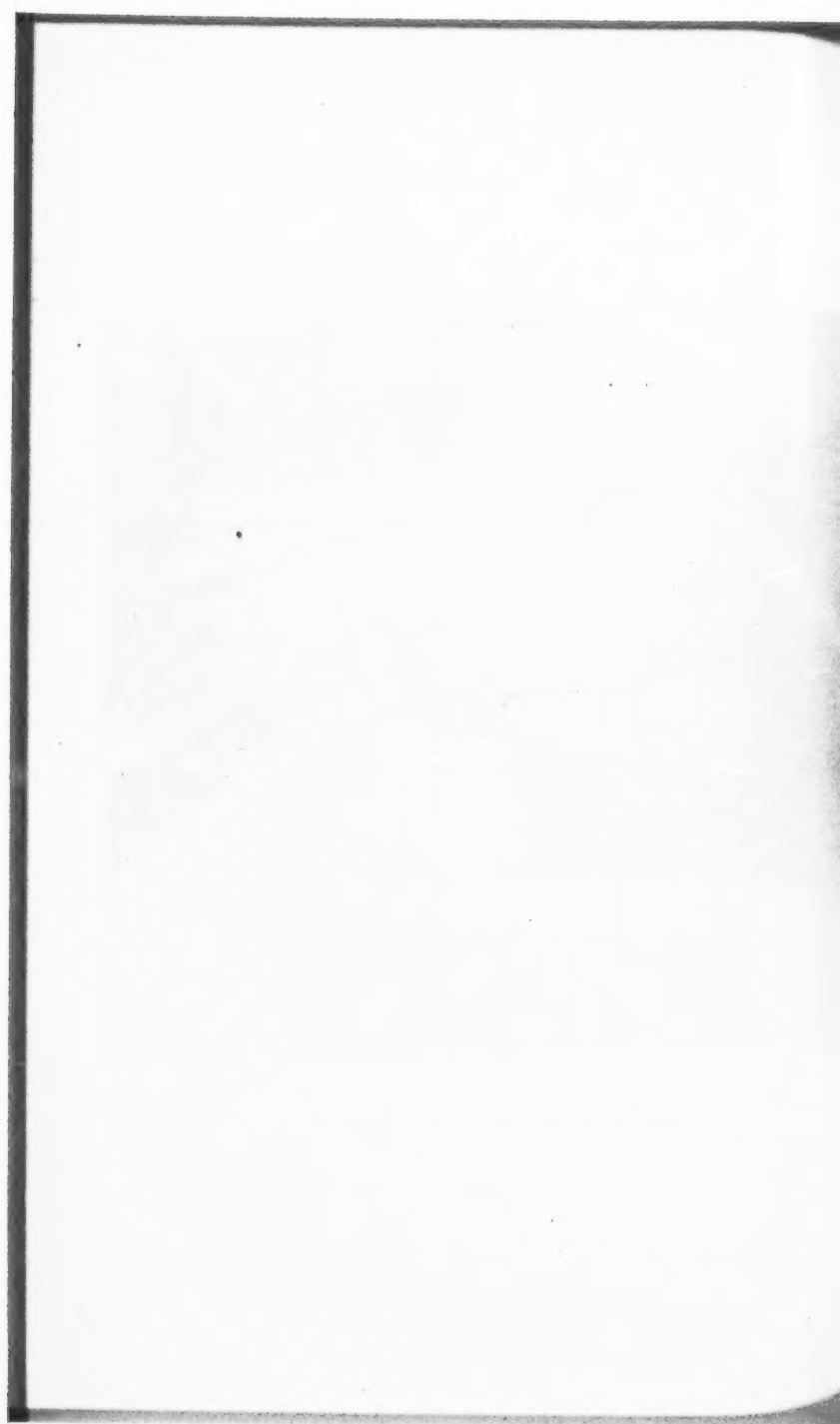


PHOTOGRAPH NO. 1.

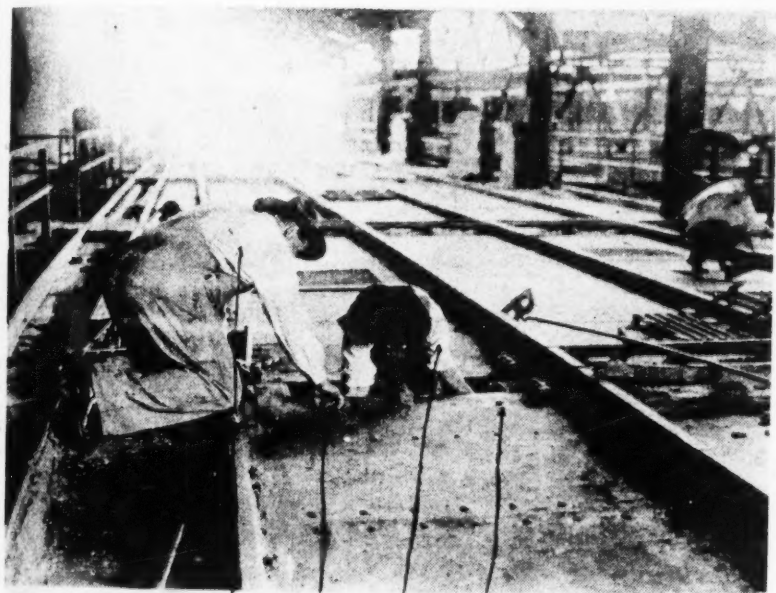




PHOTOGRAPH NO. 2

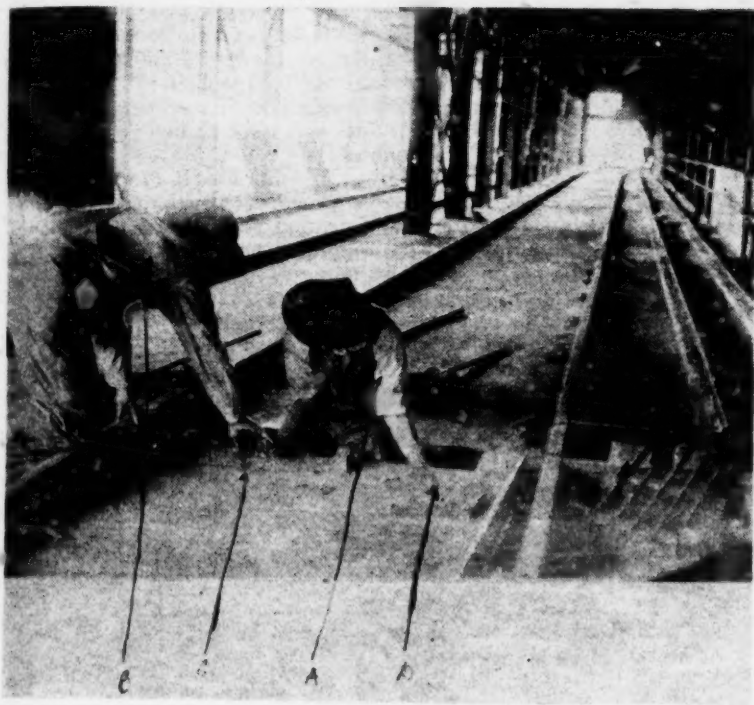




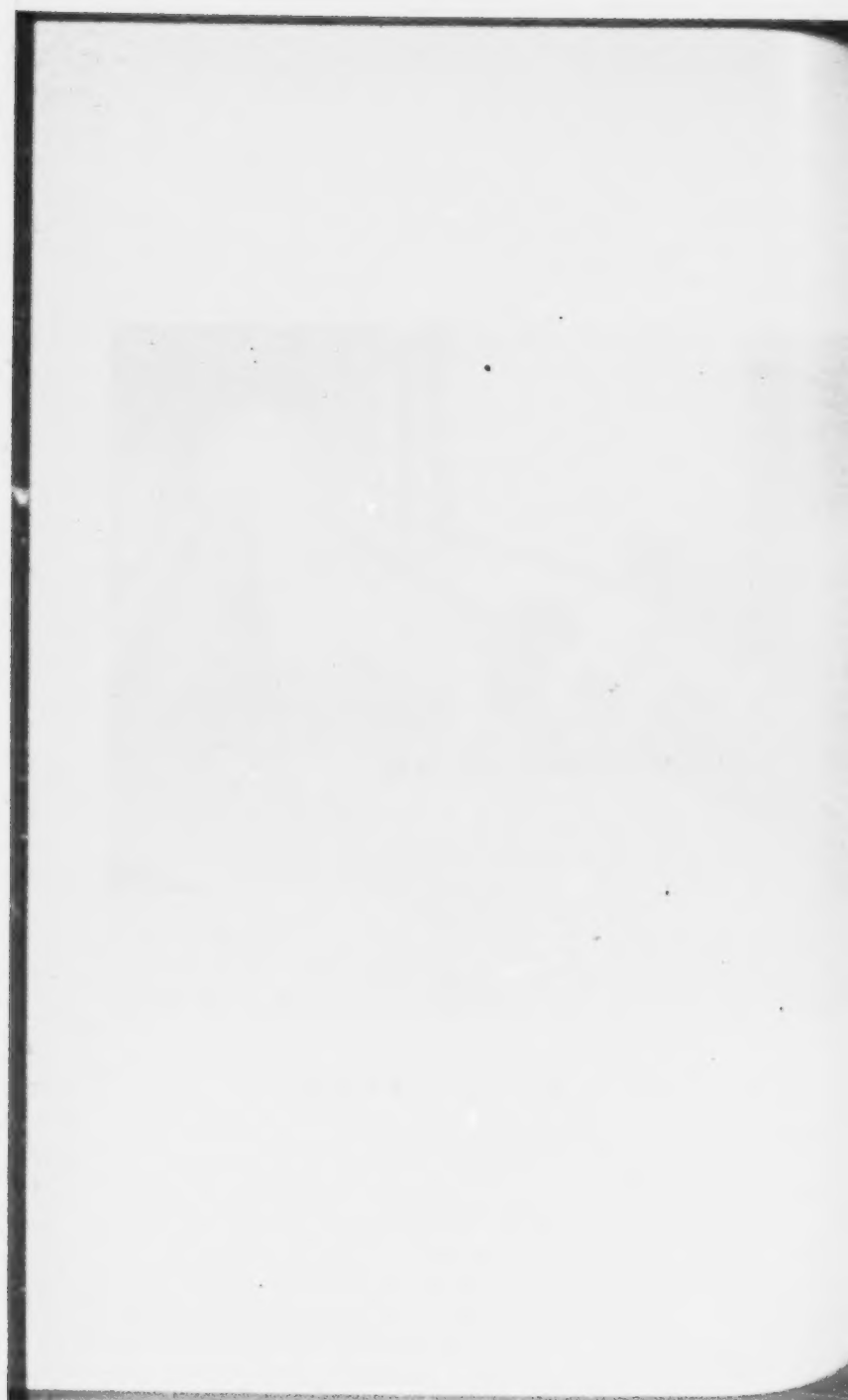


PHOTOGRAPH NO. 3.





PHOTOGRAPH NO. 4.



Marshall sitting on said feed floor at the edge of said hopper holding in place on the south side of said hopper with his hands the identical angle iron used by Hammer at the time of his said injury. That arrow C indicates the bolt which runs through the angle iron and feed floor and protrudes above the feed floor; said bolt being now in position and ready for the said Jones indicated by arrow B, to place thereon the nut lying upon the feed floor indicated by arrow D.

That view marked Photograph No. 3, is another view of said feed floor and of said hopper. That arrow A indicates said Marshall holding said angle iron as described hereinabove in reference to Photograph No. 2. Arrow B, indicates said Jones placing said nut upon said bolt as described hereinabove in reference to Photograph No. 2. That arrow D indicates the nut already placed and screwed down on the bolt at the other end of said angle iron. That arrow C indicates the nut that the said Jones is screwing down on the bolt at the near end of said angle iron.

That view marked Photograph No. 4 is another view of said feed floor and of said hopper. That arrow A indicates the said  
248 Marshall holding an angle iron in position on the north end of said hopper in the manner described hereinabove in reference to Photograph No. 2. That arrow D indicates the nut screwed down upon the bolt protruding through said angle iron and said feed floor. That arrow B indicates the said Jones screwing down the nut indicated by the arrow C upon the bolt protruding through said angle iron and said feed floor.

That this affiant will present himself upon due notice at any hearing or trial in the above entitled cause and that he will give as testimony in such hearing or trial, the statements herein contained.

And further affiant saith not.

GEORGE W. FRASER.

Subscribed and sworn to before me this 6th day of January, A. D., 1916.

[NOTARIAL SEAL.]

WALTER B. FOOTE

*Notary Public in and for the County of  
Greenlee, State of Arizona.*

My Commission expires Dec. 31, 1916.

(Here follow photographs marked pp. 249, 250, 251, and 252.)

253 In the United States District Court for the District of Arizona.

JOSEPH B. HAMMER, Plaintiff,

VS.

THE ARIZONA COPPER COMPANY, LIMITED (a Corporation),  
Defendant

*Affidavit.*

O. A. Risdon, being by me first duly sworn according to law on oath deposes and says:

That he is now and has been for 15 years last past, a resident of the Town of Clifton, County of Greenlee, State of Arizona; that he is by trade and profession a photographer for 18 years last past and that affiant has maintained a studio and has been engaged in the trade and profession of a photographer in the said Town of Clifton for the said period of 15 years last past.

That on the 5th day of January, 1916, affiant in company with George W. Fraser, A. B. Jones, W. C. Marshall and Charles Bond, all of the said Town of Clifton, at the request of The Arizona Copper Company, Limited, the defendant above named, went to defendant's smelter near the said Town of Clifton and in particular upon and about what is known as the feed floor of said new smelter whereon are situate a number of hoppers used to feed ore to the furnaces below said feed floor.

That affiant has examined photographs marked Photograph No. 1, Photograph No. 2, Photograph No. 3 and Photograph No. 4, respectively, attached to the foregoing sworn affidavit of  
254 George W. Fraser; that each of said photograph- is a full, true and correct reproduction made by this affiant from camera plates made and taken with an accurate camera by this affiant at said smelter on last said date in the presence of said persons and that said Photographs and each thereof, are full, true and correct representations of that part of said smelter and in particular of the feed floor and said hoppers embraced within the view of said photographs and each thereof.

O. A. RISDON.

Subscribed and sworn to before me this 6th day of January, 1916.

[NOTARIAL SEAL.]

WALTER B. FOOTE,

*Notary Public in and for the County  
of Greenlee, State of Arizona.*

My Commission expires Dec. 31, 1916.

In the District Court of the United States for the District of Arizona.

JOSEPH B. HAMMER, Plaintiff,

vs.

THE ARIZONA COPPER COMPANY, LIMITED (a Corporation),  
Defendant.

*Affidavit.*

Estanislado Sierra, after being duly sworn, on his oath deposes and says:

255 That on the twenty-eighth day of December, 1914, I was employed by the Arizona Copper Company, Limited, at its smelter about two miles south of the Town of Clifton, and was working at that time and place with Mike Donahue, a machinist who was engaged in repairs in machinery at said smelter.

That at that time and place I was working for Mike Donahue in the roasters and we were engaged in making holes in some plates in order to make the coal bin higher in said roasters.

That at about eleven o'clock some one came and took away the air motor which we were using, removing it to the reverb-atory furnaces which are immediately under the feed floor of the smelter.

That at about one thirty p. m., I went from the roasters over to the feed floor to bring or have brought back said air motor to the roasters and while I was there the calcine car came on to the feed floor on the track where the hopper in which Hammer was working is situated. That calcine car stopped about 15 or 20 feet from the hopper in which Hammer was working and I heard Joe Hammer's helper say to the motorman of the calcine car, Estanislado Provencio, to come on. I also hear Joe Hammer call out from the hopper in which he was working, to the motor man to come on and he appeared to be mad about something. After being repeatedly told to come out of the hopper he refused and after this the motor man started the calcine car and moved over the hopper in which Hammer was at work.

That at the time the car passed over the Hopper in which Hammer was working, I was standing at a point on the feed  
256 floor about 20 to 25 feet in an easterly direction from the hopper in which Hammer was working. I think it was on

the 28th day of December, A. D., 1914. At least, it was on the day Mr. Hammer was scalded by calcine while at work in this hopper.

That at the time the calcine motor passed over the hopper in which Hammer was at work, I saw only three people, namely, Mauro Provencio, Gustavo Provencio and Estanislado Provencio. Estanislado Provencio, the motorman was on the other side of the track, opposite to me, but in plain view.

That I know Elmer Bentley but I did not see him at or near the hopper in which Hammer was at work either before or after the calcine car passed over the hopper.



That my residence is in Clifton, Arizona, where I have lived for the past twenty years.

ESTANISLADO SIERRA.

Sworn and subscribed to before me this sixth day of January, A. D., 1916.

[NOTARIAL SEAL.]

JOHN EVANS,  
Notary Public.

My Commission expires Feb. 23rd, 1916.

257 In the United States District Court for the District of Arizona.

JOSEPH B. HAMMER, Plaintiff,

vs.

THE ARIZONA COPPER COMPANY, LIMITED (a Corporation), Defendant.

J. G. Cooper, being by me first duly sworn according to law on oath deposes and says:

That he is the Cashier of The Arizona Copper Company, Limited, the defendant above named, and is authorized to make this affidavit; that he has read the foregoing affidavits of T. M. Vaughan and Elizabeth Vaughan his wife, and of W. C. Marshall, A. B. Jones, George W. Fraser and Charles Bond, and that the matters and things set forth in each of said affidavits pertaining to this cause and proffered for production in evidence at any trial or retrial of this cause, are in fact newly discovered evidence; that the matters and things contained in each of said affidavits could not have been produced at the trial of this cause with reasonable diligence.

That immediately following the injury to plaintiff herein and continuously to the time of the trial of this cause, this defendant used all possible diligence by inquiring and investigating to ascertain and learn the names of the persons who had witnessed the injury to plaintiff and who were possessed of any information or knowledge pertinent to the issues involved herein; and that this defendant did interview and examine and did produce at the trial hereof, all persons available to defendant whom this defendant knew to have knowledge or information pertinent to the issues herein.

258 That it was a surprise to this defendant on the trial hereof that witness Elmer Bentley called on behalf of plaintiff had witnessed the injury to plaintiff; that the testimony of said witness Bentley that he had been a spectator to the injury to Hammer was the first intimation to defendant that said Bentley was possessed of knowledge and information pertinent to the issues herein; that immediately subsequent to the trial hereof, this defendant caused the testimony of the said Bentley of the trial hereof to be investigated and upon such investigation defendant learned through the said T. M. Vaughan and his wife of the conversation with the said Bentley, set forth and detailed in their respective affidavits; that immediately following said trial, this defendant

endeavored to and did get into communication with Harry Neilson, its former foreman of repairs at its smelter where this plaintiff was injured and learned by letter from said Neilson that at the time of the injury to this plaintiff the said Neilson and the said Bentley were in conversation together concerning the work to be done at said smelter, and said Neilson informed this defendant that the said Bentley could not honestly and truthfully state that the car which ran over the hopper wherein Hammer was working at the time of his injury, did not stop before so going over said hopper and thereby give the said plaintiff an opportunity to get out of said hopper and assume a place of safety; that said Neilson informed this defendant in said letter that the said Bentley did not alone take plaintiff out of the hopper after his injury and that the first man

to Hammer after his injury was plaintiff's helper and that  
259 when said Neilson came upon the scene of the injury a few minutes after said injury had occurred, said Bentley said to the said Neilson, "I don't see how he ever got out. When I came upon the feed floor I thought the car had run over old Joe, the way he was lying on the feed floor;" that prior to the trial hereof this defendant, its officers agents or attorneys, were not apprised by the said Neilson or by any other person of these statements attributed to the said Bentley, in fact was not apprised that the said Bentley was in the possession of any knowledge or information of whatsoever kind, pertinent or relevant to the issues in this cause. That immediately upon the receipt of said letter from said Neilson this defendant caused a telegram to be sent to the said Neilson at his address in Chicago, asking the said Neilson to return immediately to the Town of Clifton, it being the purpose of this defendant to take the sworn affidavit of the said Neilson upon the statements contained in said letter to be produced before and filed with this court in support of defendant's petition for new trial. That in the interim from the receipt of said letter to the sending of said telegram, said Neilson had departed from the City of Chicago to the City of Clinton, Indiana, and on that account the delivery of defendant's telegram was delayed. That upon the receipt of said telegram said Neilson immediately wired this defendant that he was ready to return forthwith to the Town of Clifton; that thereupon defendant wired said Neilson at the said Town of Clinton, Indiana, to start at once for the Town of Clifton, and arranged by wire that

the said Neilson be afforded immediate transportation from  
260 said Clinton, Indiana, to said Town of Clifton; that on the 5th day of January, 1916, this defendant received a wire from the said Neilson stating that he was enroute for the town of Clifton and would arrive thereat on or about the 9th or 10th day of January, 1916; that upon the arrival of the said Neilson this defendant proposes to and will take the sworn affidavit of the said Neilson to the matters and things contained in said letter, and will present and file with said court as soon as possible, said affidavit so taken.

That this defendant was surprised by the testimony of the plaintiff herein that it was impossible for plaintiff to place the angle

irons in the hopper on which he was working at the time of his injury by remaining upon the top of the feed floor and not at any time in such operation going down and into said hopper; that after said trial this defendant caused its representatives to proceed to the smelter of this defendant, whereat plaintiff was injured and there to perform the experiment upon the identical hopper and with the identical angle irons used by plaintiff to determine if said angle irons could be placed in said hopper as claimed by defendant and as denied by this plaintiff, by remaining upon the feed floor and at no time during such operation going down into said hopper. That the persons used by this defendant for that purpose were George W. Fraser, A. B. Jones, W. C. Marshall and Charles Bond. That the result of said experiment proved that said angle irons could be placed in such hopper as claimed by defendant.

That owing to the conditions of strike against this defendant in all its property and at said smelter this affiant is informed  
261 and believes that it would have been impossible or would have been an act attended by personal danger to persons acting, to have attempted to perform said experiment upon said hopper within a reasonable time before the trial of this cause, to-wit: from and after the 11th day of September, 1915, upon which said date said strike was called.

That subsequent to the trial of this cause defendant has learned that one Estanislado Sierra a former employee of defendant and a former helper of one Mike Donahue a machinist who was engaged in repairs to machinery at said smelter and in the employ of defendant was in the possession of knowledge and information relevant and pertinent to the issues herein to the extent and in the manner set forth in copy of the sworn affidavit of the said Estanislado Sierra hereinbefore attached; that prior to the trial of this cause, this defendant did not know and by the exercise of reasonable diligence could not have known that said Estanislado Sierra was in possession of such knowledge and information and in this connection affiant re-asserts the statements hereinbefore made relative the diligence of defendant in the matter of investigating and ascertaining the names of persons possessed of information and knowledge relative the issues herein.

That this affiant is informed and believes that the matters and things set forth in the foregoing affidavits are true in substance and in fact and that upon further trial or re-trial of this cause, the person and persons herein named will upon due notice, present  
262 themselves at a further trial or re-trial and will give in evidence the statements contained and indicated in said affidavits, and further affiant saith not.

J. G. COOPER.

Subscribed and sworn to before me this 6th day of January, A. D., 1916.

[NOTARIAL SEAL.]

WALTER B. FOOTE,  
Notary Public in and for the County of  
Greenlee, State of Arizona.

My commission expires Dec. 31, 1916.

In the District Court of the United States for the District of Arizona.

JOSEPH B. HAMMER, Plaintiff,

vs.

THE ARIZONA COPPER COMPANY, LIMITED (a Corporation), Defendant.

*Affidavit.*

H. A. Elliott, being by me first duly sworn according to law on oath deposes and says:

That he is an attorney for The Arizona Copper Company, Limited, a corporation, the defendant above named, and that he was counsel of record in the trial of this cause; that he has read the foregoing affidavit of J. G. Cooper and that the matters and things therein set forth are true in substance and in fact to the best of his information and belief.

H. A. ELLIOTT,

Subscribed and sworn to before me this 6th day of January, 1916.

[NOTARIAL SEAL.]

WALTER B. FOOTE,

*Notary Public in and for the County of  
Greenlee, State of Arizona.*

My commission expires Dec. 31, 1916.

263 In the United States District Court for the District of Arizona.

JOSEPH B. HAMMER, Plaintiff,

vs.

THE ARIZONA COPPER COMPANY, LIMITED (a Corporation), Defendant.

*Affidavit of Harry Neilson.*

Harry Neilson, being by me first duly sworn according to law on oath deposes and says:

That he is now and has been for more than eight (8) years last past, a resident of the Town of Clifton, County of Greenlee, State of Arizona, and for five (5) years last past has been a foreman of repairs in the smelting department of The Arizona Copper Company, Limited, the defendant above named, both at what is known as its "Old Smelter" in the said Town of Clifton, and at what is known as the "New Smelter" at or near and below said Town of Clifton on the San Francisco river; that on the 28th day of December, 1914, affiant was in the employ of said company as such foreman at its said new smelter; that affiant well knows Joseph B. Hammer, the plaintiff above named and that said Hammer on the said 28th day of December, 1914, and for considerable time prior thereto had been

in the employ of said The Arizona Copper Company, Limited, at said new smelter and was a workman engaged in repairs under the authority and supervision of this affiant; that on the said 28th day of December, 1914, the said Hammer was engaged in placing angle irons in between the bottom of the feed floor and the top of a hopper on what is known as No. 1 furnace at said new smelter.

264 That this affiant well knows Elmer Benton Bentley who on said 28th day of December, 1914, was in the employ of said company as a repairman under the authority and direction of affiant and who this affiant is informed and believes was called as a witness for said Hammer at the trial of this cause at the City of Tucson, in the month of November, 1915.

That said Hammer at about the hour of 1:30 p. m., on said 28th day of December, 1914, while working placing said angle iron as aforesaid, was injured by being burned with hot calcine.

That affiant has examined the photographs hereto attached, marked Photograph No. 1, Photograph No. 2. That said photographs were taken by O. A. Risdon, a photographer residing and maintaining and operating a studio in the said Town of Clifton, in the presence of this affiant on January 12th, 1916, and that said photographs are a full, true and correct representation of that part of said new smelter included within the view thereof, and in particular of the back or west end of said No. 1 furnace.

That the arrow E on said photograph No. 1 represents the converter slag launder leading from converted room to said furnace No. 1.

That the arrow C on said Photograph No. 1 represents the west edge of the top of what is known as the feed floor on which said Hammer was working at the time of his said injury and over and across which is operated what are known as calcine cars, from one of which the hot calcine escaped and burned plaintiff.

That the arrow D represents the main air line running parallel to the back or west end of the furnaces at said new smelter and parallel to and back of the west end of said furnace No. 1. (Photograph No. 1.)

265 That at the time of the said injury of the said Hammer, this affiant and the said Bentley were engaged in conversation at the back or west end of said furnace No. 1.

That the arrow B on said Photograph No. 1, indicates the position of the said Bentley at the time of the said injury of the said Hammer and at the time the said Bentley and this affiant were engaged in conversation as aforesaid; that at such time and place the said Bentley was standing with his feet in said launder with his back to the east end of said furnace No. 1, and with his back turned to the place where the said Hammer was engaged in work as aforesaid.

That the arrow A on Photograph No. 1 indicates approximately the position of affiant at the time of the said injury of the said Hammer and at the time of the said conversation between this affiant and the said Bentley; that the indicated portrayed position of this affiant in said picture is approximately the position occupied by affiant at the time of said injury and of said conversation, in this that at last

said time affiant was standing on the other or further or north side of said launder looking up to and talking with said Bentley; that at the time of the injury of said Hammer and for some minutes prior thereto, this affiant and the said Bentley were standing as herein indicated, facing each other and engaged in conversation; that this affiant does not now remember the exact subject or subject matter of said conversation, but believes that it was in reference to the work to be performed by said Bentley at said new smelter.

That while affiant and the said Bentley were so engaged in conversation this affiant heard and has cause to believe that the said

266 Bentley heard a cry coming from the direction of the feed floor; that affiant and Bentley continued their conversation subsequent to said cry, paying little attention to the same, as this affiant believes for the reason that affiant considered that said cry came from one person yelling or crying to another; that closely following said cry, this affiant heard and has reason to believe that the said Bentley heard another cry coming distinctly as if from someone in distress and pain on said feed floor.

That on hearing said second cry this affiant exclaimed, "What's that" and started to run around to the south of said furnace to the ladder leading to said feed floor and that said Bentley then climbed over I-beams and pipes onto the feed floor; that affiant came upon said feed floor and discovered the said Hammer lying on the top of the floor, burned by hot calcine, which affiant believes came from an escapement from a calcine car; that affiant found present on said feed floor, about and assisting said Hammer, the said Bentley and a Mexican boy who was and had been acting as a helper to said Hammer and another Mexican who had been operating the calcine car as motorman; that there may have been other persons near, whom affiant does not now recall; that upon approaching the said Hammer and the said Bentley, the said Bentley said to this affiant, "I don't see how he (meaning Hammer) ever got out. When I got upon the feed floor I thought the car had run over Old Joe, the way he was laying on the feed floor," or words to that effect.

That at the time of the said injury to the said Hammer and for several minutes prior thereto, the said Bentley was talking with this affiant as aforesaid and was standing facing this affiant and standing with his back to the said west end of said No. 1 furnace and with his back to the place where the said Hammer was working as aforesaid, and in such a position that he could not and did not see  
267 or observe what was going on on said feed floor at such time, either at the time of approach of said calcine car along said feed floor toward the point where said Hammer was working or at the time of the injury of the said Hammer.

That Photograph No. 2 is another view and representation of that part of said smelter hereinabove described and that the arrow D, represents the main air line running parallel to the back or west ends of the furnace at said new smelter and parallel to and back of west end of said furnace No. 1.

That the arrow A indicates approximately the position of affiant

at the time of the said injury of the said Hammer as hereinbefore described.

That the arrow B indicates the position of the said Bentley at the time of the said injury of the said Hammer and at the time said Bentley and this affiant were engaged in conversation as hereinabove described.

That the arrow C represents the west edge of the top of what is known as the feed floor on which Hammer was working at the time of his said injury as hereinabove described.

That on the 5th day of October, 1915, owing to the general shut-down of said defendant's smelter, this affiant left the Town of Clifton and went to Chicago for the purpose of securing other work, if to be found, and that affiant did go to work in the Town of Clinton, State of Indiana, in the early part of December, 1915, and continued such work until in the early part of January, when affiant received telegraphic requests from said The Arizona Copper Company, Limited, to return to Clifton, which affiant did as soon as could be arranged after receiving such telegraphic requests, arriving in the said Town of Clifton, on the 10th day of January, 1916.

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Further affiant saith not.

HARRY NEILSON.

Subscribed and sworn to before me this 24th day of January, 1916.

[NOTARIAL SEAL.]

WALTER B. FOOTE,

*Notary Public in and for the County of Greenlee,  
State of Arizona.*

My commission expires December 31, 1916.

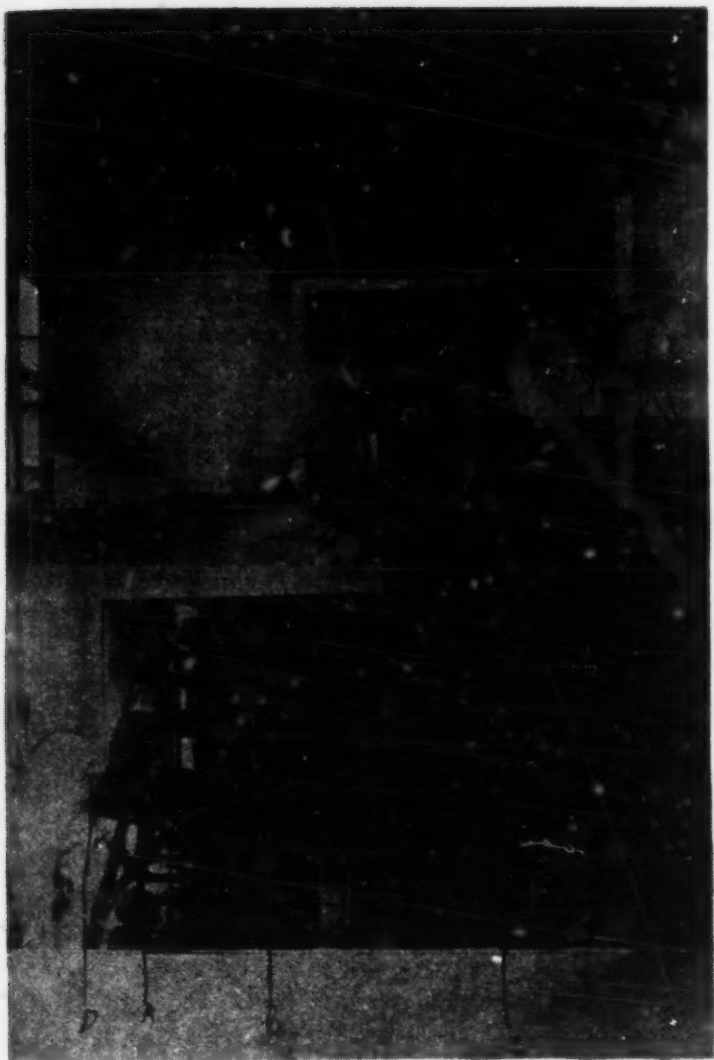
(Here follow photographs marked pp. 269 & 270.)





PHOTOGRAPH NO. 1.





PHOTOGRAPH NO.2



271 Be it further remembered that contravening said petition for new trial, and said affidavits filed in behalf of defendant, and to maintain the issues in that respect on his part, plaintiff above named, presented, served and filed the following affidavits:

In the United States District Court for the District of Arizona.

JOSEPH B. HAMMER, Plaintiff,

vs.

THE ARIZONA COPPER COMPANY, LIMITED, a Corporation,  
Defendant.

STATE OF ARIZONA,

County of Greenlee, ss:

Fred H. Hill being duly sworn, says: that at the times and places herein mentioned, he was a Deputy Sheriff of said county; that said defendant during the latter part of October, 1915, requested the sheriff of said county to guard its smelter at said county against violent intrusion, which said sheriff did, but that no officer, agent, or employee of defendant has at any time since been prevented from entering said smelter for the purpose of inspecting the hopper in which plaintiff was injured on or about Dec. 28th, 1914, and that ever since September 11th, 1915, said defendant could have with perfect safety inspected said hopper and experimented with the same for the purpose of obtaining evidence had it desired to do so, and that it has made no effort to inspect said hopper since October, 1915, until January 5th, 1916, when some employees entered said smelter without molestation and inspected the same.

272

FRED H. HILL,

Deputy Sheriff.

Subscribed and sworn to before me this 10th day of January, 1916. My Commission expires Feb. 15th, 1916.

[NOTARIAL SEAL.]

L. KEARNEY,

Notary Public.

In the District Court of the United States for the District of Arizona.

JOSEPH B. HAMMER, Plaintiff,

vs.

THE ARIZONA COPPER COMPANY, LIMITED, a Corporation,  
Defendants.

STATE OF ARIZONA,

County of Greenlee, ss:

*Affidavits.*

H. Halter, and R. F. Sellers, each of whom being first duly sworn, deposes and says: each for himself and not one for the other, that

he resides at Clifton, Arizona; that he is a skilled iron worker and understands boiler making work and is fully acquainted with the nature and character of work pertaining to fitting and securing angle-irons in hoppers, such as was done and required at the smelter of the defendant herein mentioned, and fully understands how such work ought to be done:

That on January 9th, 1916, at the request of said plaintiff, he visited the smelter of said defendant at Clifton, Arizona, and carefully inspected the hopper at said smelter in which the plaintiff received his present injuries by being burned by calcine on December 28th, 1914, and carefully inspected the angle-irons in said hopper and experimented with the same for the purpose of ascertaining if the angle irons in said hopper could be marked for cutting, marked for drilling of bolts, marked for making a workmanlike  
273 fit, and whether the angle-iron could be held in proper position for such markings and fittings and properly bolting the same in said hopper, without the one doing said work going down into said hopper, and on such inspection, examination and experiments found that such work could not be done without going down into said hopper, and that such work could not be done from the outside, and found that it was absolutely necessary to get down into said hopper in order to hold the angle-irons in place to do the markings for cuts, bolts, fittings, and to securely fasten the same in a workmanlike manner in said hopper.

The difficulty does not consist in *perform* said work by taking off old angle-iron, unbolting the same, but the difficulty in *perform* said work does consist in holding the angle-irons in place in the hopper underneath the edge thereof where it is dark so as to ascertain where the same ought be cut to fit the hopper and perform the markings beneath the surface of the hopper where there is but scant light and make the same for the holes for bolts which pass through the angle irons so as to securely fasten the same in said hopper in order to make the same dust proof, and to hold said angle-irons in place for such markings for cutting and for the holes to be drilled in order to secure a close and workmanlike manner of fitting of the angle irons in the hopper.

That on such examination and inspection of said hopper he further found that the defendant through any employees it might have sent, on January 5th, 1916, did not do nor perform any of said markings, drillings, and fittings, at said hopper, and found that all that was done that the bolts which hold said angle-irons in said hopper had been removed and one angle iron had been taken off, and another had been loosened up by unscrewing the bolts,  
274 and doing such loosening did not require any skill or knowledge of said work, and in no way demonstrating the difficulties of performing the work of properly fitting and securing said angle irons in said hopper.

That he further made an effort to ascertain by actual experiment with one of said angle irons to ascertain whether it could be held in proper place in said hopper without going down into said hopper in order to perform said markings and fittings and found that such

work could not be done from the outside, but that it was necessary for the one doing such work to get down in the hopper in order to do said work in a workmanlike manner.

That said H. Halter, says for himself, that he is 39 years of age, is a boiler maker by trade; that for eighteen months he was foreman for said defendant in charge of boiler and sheet iron construction at said smelter, and that while he was such foreman he had put in most of the hoppers in said smelter which are the same as the hopper aforesaid; that the work of putting in said hoppers were done under his direction by men employed under him.

H. HALTER.

R. F. SELLERS.

Subscribed and sworn to before me this 10th day of January, 1916, and I hereby certify that I consider the above named deponents H. Halter and R. F. Sellers, credible and reliable witnesses, and that the foregoing affidavit was read by each of them before their signatures were affixed thereto, and the oath made by them.

My commission expires Oct. 25th, 1917.

[NOTARIAL SEAL.]

E. H. APODOCG,

*Notary Public.*

275 In the District Court of the United States for the District of Arizona.

JOSEPH B. HAMMER, Plaintiff,

vs.

THE ARIZONA COPPER COMPANY, LIMITED, a Corporation, Defendant.

STATE OF ARIZONA,

*County of Greenlee, ss:*

*Affidavit of Elmer Benton Bentley.*

Elmer Benton Bentley, being first duly sworn, says:

That he was a witness on the trial of said cause in said court; that at the request of L. Kearney, Attorney for said plaintiff, he has read the affidavits of T. M. Vaughn, Elizabeth Vaughn, W. C. Marshall, A. B. Jones, Charles Bond, George W. Fraser, Estanislado Sierra, and J. G. Cooper, all of which are sworn to before Walter B. Foote, A Notary Public in and for Greenlee County, State of Arizona, on the respective dates Dec. 4th, 1914, Dec. 6th, 1916, Dec. 6th, 1916, Dec. 6th, 1916, Dec. 6th, 1916, Dec. 6, 1916, Dec. 6th, 1916, except the deposition of said Estanislado Sierra, which was sworn to before John Evans, a Notary Public, on Dec. 6th, 1916; that said affidavits as affidavit is informed and believes are filed in said cause in support of defendant's petition for new trial of said cause;

Affiant says he did not say to nor in the presence or hearing of said T. M. Vaughn and Elizabeth Vaughn, or either of them, or



to any other person that "the damned old fool was told to get out and he (meaning the said Hammer) refused to get out on account of its being a tight place and hard to get out of and into," as stated in the affidavits of said T. M. Vaughn and Elizabeth  
276 Vaughn, and that no such conversation was had and that affiant did not make such remarks nor say *said* things in the presence or hearing of said T. M. Vaughn and Elizabeth Vaughn, or either of them, or in the presence or hearing of any other person.

That on January 6th, 1916, affiant at the request of L. Kearney, visited the smelter of said defendant at Clifton, Arizona, to inspect the hopper in which plaintiff sustained his injuries by being burned by calcine on or about Dec. 28th, 1914, for the purpose of ascertaining the work, nature of the work and what experiments had been carried on, done or performed by George W. Fraser, A. B. Jones, W. C. Marshall and Charlie Bond, on or about the 5th day of January, 1916, and of the particular acts and things stated that they did in their said affidavits herein, and that this affiant on January 6th, 1916, on making said examination of said hopper and angle-irons which were stated to have been taken off and put in place by said W. C. Marshall, George Fraser, A. B. Jones and Charlie Bond, on Jan. 5th, 1916, in the hopper in which plaintiff received his injury by being burned by calcine, Dec. 28th, 1914, affiant discovered and found that said W. C. Marshall, George Fraser, A. B. Jones, and Charlie Bond in their said experimental work had done and failed to do the following things, to-wit:

That they had taken up the small Fettling track that crosses the wide gauge at right angles over the brink of the hopper aforesaid; that they had loosened the bolts that held the angle-iron in place, and that they had not replaced the same in workmanlike manner, in that they did not rebolt the same up tightly, but left a space of about two inches opening at the upper surface thereof; that they did not do any markings for drilling of holes for bolts nor do  
277 any markings of angle-irons to be cut off to fit the spaces in the hopper. All they did was to remove the bolts and loosen the angle-iron without securely replacing it again.

That the difficulty in performing the work does not consist in taking off the angle-irons by unscrewing the bolts as stated in their said affidavits, but the difficulty arises in holding the angle-irons in place in the hopper underneath the edge thereof so as to ascertain where the same should be cut off to fit the hopper and do the markings in and underneath the surface of the hopper where the holes are to be drilled for the bolts which pass through the angle-irons so as to securely and tightly fasten the angle-irons in the hopper so as to make it dust proof, and to mark so that holes may be drilled to match the holes in the angle-irons and to the end to secure close fittings when the angle-irons are finally bolted in place.

That said W. C. Marshall, George Fraser, A. B. Jones, and Charlie Bond did not do nor perform any markings for holes to be drilled or cut, and did not drill nor cut any holes, nor mark or cut

any angle-irons to fit the hopper, and did not perform any of the difficult feats of marking, fitting, cutting or drilling, nor fitting in place the said angle-irons.

That affiant on Jan. 6th, 1916, in the presence of one person, tried to hold said angle-irons in place underneath in said hopper so that said markings might be done and found that the same could not be done without going down into the hopper, because it was work underneath in the hopper, the iron heavy and hard to hold in place in the darkness of the hopper, and that the markings for the cutting of angle-irons to fit, marking for holes to be drilled so  
278 that when the angle iron is finally placed to make a workmanlike job and dust proof as required cannot be done from the surface outside of the hopper;

That the said Marshall, Fraser, Jones and Bond did not, nor did either of them, perform any of the difficult features of said work, and what they did do took them five times longer to do than to do the work as a skilled mechanic would have done it, and in fact *was* all they did do was to unloose the bolts and slide the angle-irons out and partially replace one, and leave the other angle iron down in the hopper.

That the pictures Nos. 2, 3, and 4, attached to their said affidavits herein show them in the hopper doing the simple act of holding up the old angle-iron which had been cut and fitted, the holes therein drilled by the plaintiff.

Affiant says in regard to the statements of Estanislado Sierra, contained in his said affidavit herein, as follows:

That said Estanislado Sierra was not present when the plaintiff was injured by hot calcine on Dec. 28th 1914, he was not in seeing distance nor in hearing distance; the place where he was working, taking into consideration the roaring of the furnaces would absolutely prevent him from hearing any thing that the plaintiff might have said just prior to or at the time plaintiff was injured, and that he could not have heard the plaintiff's helper say anything for the reason he was not in seeing or hearing distance at the time the plaintiff was injured and that he was not within 20 nor 50 feet,

and was not upon the feed floor when the plaintiff was injured,  
279 jured, and could not have known anything of the injury of the plaintiff until some time after he had received his said injuries. Said Estanislado Sierra did not see this affiant near the hopper in which said Hammer was at work either before or after the calcine car had passed over the hopper because he said Sierra was not present, nor in hearing or seeing distance.

In regard to the matters and things set out and stated in the said affidavit of J. G. Cooper, cashier of defendant company, filed herein, which affiant has read, he makes the following statement, to-wit:

That on December 28th, 1914, the day on which plaintiff was injured by being burned with calcine at defendant's smelter at Clifton, Arizona, and pertaining to such injuries the said suit was begun and tried in said court,—this affiant, on Dec. 28th, 1914, had a conversation with said George W. Fraser, A. B. Jones and Harry

Neilson, all of whom were then and there officers and agents of the defendant company and as such were in charge of the smelter work of defendant at its said smelter at Clifton, Arizona, and each of those persons was told by affiant on December 28th, 1914, or on the following day, that this affiant was present and saw the said injury of the plaintiff; that said George W. Fraser and Harry Neilson, during December, 1914, asked this affiant a few questions about the circumstances of the injury of the plaintiff.

That said George W. Fraser for many years has been the general-manager of the smelter-works of defendant, and at the time of the said conversation with him during December 1914, in which affiant told him some of the circumstances of the injuries of the plaintiff, he, said George W. Fraser, was general-foreman of  
280 the repair-work of the defendant at its smelter aforesaid, and said Harry Neilson was during December, 1914, a foreman in charge of certain department of work for defendant at its said smelter, wach of whom were bosses and in charge of certain gangs of workmen of the defendant at its said smelter.

That for at least five months before the trial of said cause, the said George W. Fraser believed that this affiant would be called as a witness on the trial of this action, and had asked this affiant what he would testify to when called as a witness, and that said Fraser had long before the trial of this action told affiant that he, Fraser, would go as a witness, and affiant had at all times up to the trial of the case expected to be called as a witness on the part of the defendant, but when the time came for the trial, the defendant for some cause did not request affiant to go as a witness.

It is not true that defendant had no knowledge or information of the matters and things that affiant knew concerning the injury of the plaintiff until the time of the trial of said action in said court, the defendant knew from the first that affiant was present and saw the injury of the plaintiff and knew very well that in all probability that this affiant would be called as a witness on the trial of said action.

Further it is not true that affiant and Harry Neilson were engaged in a conversation at the time plaintiff was injured, and it is not true that affiant could not truthfully state that the car did not stop before running over the plaintiff at the time of his injury. It is not true that affiant informed Harry Neilson, or any other person, that affiant did not alone take plaintiff out of the hopper after  
281 his injuries, or that the first man to Hammer after his injury was the plaintiff's helper.

It is not true that when the said Neilson came up to the scene of the injury a few minutes after said injury had occurred, or at any other time or place, that this affiant said to said Harry Neilson, or to any other person, the following, to-wit:

"I don't see how he ever got out, when I came upon the feed floor I thought the car had run over old Joe, the way he was laying on the feed floor." Nor was any such conversation had, either in like words, effect or purport. The truth and fact is and was that

this affiant was the first to the plaintiff and helped him out of the hopper in which he was injured, and had reached the plaintiff immediately after his injury, just as I stated on the trial of this action, and the fact is that Harry Neilson did not come until some time after I had helped the plaintiff out of the hopper. The said George W. Fraser and Harry Neilson knew from statements from me on the day of the injury to plaintiff that I had helped him out of the hopper.

ELMER BENTON BENTLEY.

Subscribed and sworn to before me this 7th day of January, 1916.  
My commission expires Oct. 25, 1917.

[NOTARIAL SEAL.]

E. H. APODACA,  
*Notary Public.*

282 In the District Court of the United States for the District of Arizona.

JOSEPH B. HAMMER, Plaintiff,

vs.

THE ARIZONA COPPER COMPANY, LIMITED, a Corporation, Defendant.

STATE OF ARIZONA,

County of Greenlee, ss:

*Affidavit of Plaintiff.*

Joseph B. Hammer, being first duly sworn, deposes and says; that he is the plaintiff named in said cause and court; that when he was injured by hot calcine in a hopper of defendant's smelter at Clifton, Arizona, on Dec. 28th, 1914, that Elmer Benton Bentley was present and assisted this affiant out of the hopper; that the only other persons present at the time affiant was injured was the helper of this affiant and the Mexican boy in charge of the calcine car.

That affiant has read the affidavit of Estanislado Sierra, filed herein in support of defendant's petition for a new trial and in regard to the truth of said affidavit this affiant states the fact to be that said Sierra was not within seeing or hearing distance when affiant was injured by hot calcine on Dec. 28th, 1914; affiant further says that he knows the said Estanislado Sierra, who is an ignorant Mexican boy, and who for the past two months has been, and presently is, boarded and clothed, free of charge, by said defendant at its refugee camp at Duncan, Arizona.

That ever since September 11th, 1915, affiant has lived at Morenci, Arizona, and during such time every few days he has personally visited Clifton, Arizona, and is thoroughly conversant with  
283 the labor troubles, peace, law and order conditions at said Clifton, and knows that said defendant, its officers, agents and servants could at any time since September 11th, 1915, with perfect safety, had it desired to do so, have visited its said smelter

and inspected said hopper and carried on all experiments therewith that it might have desired, and because there was a labor strike at said Clifton during said time does not furnish any excuse why the defendant did not examine and inspect said hopper had it desired to do so; that said strike and labor situation on January 5th, 1916, when defendant did enter said smelter and inspected and experimented with said hopper, was no different than it has been at any time since September 11th, 1915; that said strike and labor troubles have not been settled, and are just the same as they were at any time since September 11th, 1915.

Affiant further states as he did on the trial of said cause testify that the angle iron could not be put into said hopper without going down into said hopper; that affiant visited said smelter on January 9th, 1916, and inspected the hopper in which he was injured on Dec. 28th, 1914, for the purpose of ascertaining what work and experiments that the defendant through its servants, George W. Fraser, A. B. Jones, W. C. Marshall and Charlie Bond, had done or caused to be done on January 5th, 1916, and this affiant in company with H. Halter and R. F. Sellers, on said 9th day of January, 1916, carefully examined and inspected said hopper and found that the said defendant through its said employees had simply loosened the bolts that held the angle irons to said hopper, and that they did not do any markings for bolts or cutting of angle irons to fit said hopper; that the difficulty in performing said work consists in hold-

284 ing the angle iron underneath the edge of said hopper where it is dark and marking the same to but cut to fit and marking the holes to be drilled so that when the angle iron is finally secured in said hopper that it will be a close fit and the work done in a workmanlike manner, none which was done by the defendant through its said employees on January 5th, 1916; that affiant and said H. Haler and R. F. Sellers made an experiment to see if said work of putting in angle irons could be done from outside said hopper and found on such examination that the work could not be so done, and that it was absolutely necessary to go down into said hopper to do said work.

JOSEPH B. HAMMER.

Subscribed and sworn to before me this 12th day of January, 1916.  
My commission expires Oct. 25th, 1917.

[SEAL.]

E. H. APODACA,  
Notary Public.

In the District Court of the United States for the District of Arizona.

JOSEPH B. HAMMER, Plaintiff,

vs.

THE ARIZONA COPPER COMPANY, LIMITED (a Corporation), Defendant.

*Affidavit of E. H. Apodaca.*

STATE OF ARIZONA,

*County of Greenlee, ss:*

E. H. Apodaca, being duly sworn, says: that for the past fifteen years he has resided at Clifton, Arizona; that he is a teacher  
285 of the Spanish and English languages; that he has read the affidavit of Estanislado Sierra and knows the contents thereof; that for the past ten years he has been acquainted with said Sierra; that said Sierra is unable to read ordinary English; that said Sierra for the past two months or thereabouts has been living at the refugee camp of defendant at Duncan, Arizona, and as he is informed and believes that said Sierra during said time has received free board and lodging from defendant at said refugee camp.

E. H. APODACA.

Subscribed and sworn to before me this 11th day of January, 1916.  
My commission expires February 15th, 1916.

[NOTORIAL SEAL.]

L. KEARNEY,  
Notary Public.

In the District Court of the United States for the District of Arizona.

JOSEPH B. HAMMER, Plaintiff,

vs.

THE ARIZONA COPPER COMPANY, LIMITED (a Corporation), Defendant.

*Affidavit of L. Kearney.*

STATE OF ARIZONA,

*County of Greenlee, ss:*

I, L. Kearney, being duly sworn, say; That I am one of the attorneys for plaintiff in said action, that to my certain knowledge the defendant, its officers, agents and attorneys, ever since December 28th, 1914, have been looking up witnesses and evidence pertaining to the injury the plaintiff sustained at its smelter, at Clifton, Arizona, on December 28th, 1914; that for one year prior thereto and  
286 every since December 28th, 1914, the smelter at which sustained the injury concerning which this action was brought, the said smelter has been under the exclusive control and

management of the defendant, its officers and agents, and that it has had every opportunity to know and ascertain all facts about the hopper in which the plaintiff was injured.

That ever since January 1, 1915, I have resided at Clifton, Arizona, and during the labor strike period, from September 11th, 1915, up to the present time, I have been fully acquainted with the nature of the disputes between the defendant and its employees, and am fully conversant with all facts pertaining to conditions existing at said Clifton, and know that if the defendant had wished to go to its smelter and examine the hopper in which the plaintiff was injured on December 28th, 1914, that it could have done so without having been prevented from making inspections and experiments with said hopper, but the fact is that it made no such effort since Sept. 11th, 1915, until on January 5th, 1916, yet during said strike, when it went into said smelter with some of its employees and made an inspection of said hopper for the purpose of filing affidavits in support of its petition for a new trial herein, and that it made such inspection without molestation from any one.

That during the month of March, 1915, at Clifton, Arizona, one George W. Fraser, who then was, and ever since has been, general foreman of repair work for defendant at its smelter at said Clifton, who was a witness on the trial of said cause and whose affidavits are filed herein, asked me if I was attorney for the plaintiff in said action and if I would call Elmer Bentley as a witness, and in the same conversation the said George W. Fraser, said to me that Elmer Bentley knew considerable about the injury to the plaintiff, and

that he thought that Elmer Bentley would be a good witness  
287 for me on the trial of said cause, and he further said in that conversation that he had told said Elmer Bentley that if he went as a witness to tell the facts in the case and swear to no lie for any corporation; the said Elmer Bentley was a witness on the trial of said cause, and whose full name is Elmer Benton Bentley.

I further state that said George W. Fraser was the one who attended to procuring the attendance of the witnesses on the part of the defendant on the trial had in said cause, and that he advanced the cost money to defray the expenses of witnesses for defendant on going to Tucson, Arizona, to attend the trial of said cause and that for two weeks before the time of said trial, the said George W. Fraser was assisting in locating witnesses for defendant on said trial, and that he advanced the expense money to the witnesses who went to said trial for the defendant.

That ever since the labor strike at said Clifton, Sept. 11th, 1915, some of the officers, agents and attorneys for said defendant have remained at said Clifton, and yet are at said Clifton, and that the said labor strike has not yet been settled.

That said George W. Fraser has been at Clifton, Arizona, ever since September 11th, 1915, with the exception of about a week, and that he is yet at said Clifton; that H. A. Elliott one of the attorneys for defendant in said action has ever since January 1, 1915, been at said Clifton, except when he went away on his own accord on business matters for a few days at a time, and that W. C.



McFarland another attorney for defendant in said action, has been at said Clifton, ever since January 1, 1915, up to the present time, with the exception of about three weeks he was away, when he returned to said Clifton, during Dec. 1915, and that he is now and for 288 for some time past has been at said Clifton, and that the said labor strike is not yet ended, and that said McFarland since his return has not been molested by any one; also J. C. Cooper, Cashier of defendant, whose affidavit has been filed herein, has practically ever since September 11th, 1915, with the exception of about two weeks when he was away on business, residing at said Clifton, and that he has not at any time been molested by strikers or any other person.

That all witnesses for defendant on the trial of said cause, and in fact all that had any knowledge of it were and have at all times been in said Greenlee County ever since September 11th, 1915, and could have been located and subpoenaed in three days' time; the fact is that the said strike and labor troubles has not at any time had anything whatever to do with procuring witnesses for defendant on said trial, and that said labor strike has not in the least prevented the defendant from procuring the attendance of witnesses on the trial of said cause.

I further state that ever since January 26, 1915, I have made a careful investigation for the purpose of ascertaining the names of all persons who were present or knew anything about the facts pertaining to said cause, and from such investigation I know that the defendant had present at said trial all persons as witnesses who were present at the injury of the plaintiff on December 28th, 1914, and at said trial it had present all persons who had any knowledge of the facts pertaining to the plaintiff's said injuries and all persons whose testimony could prove of any advantage to the defendant were present and testified at the trial of said cause.

L. KEARNEY.

Subscribed and sworn to before me this 8th day of January, 1916.  
[NOTARIAL SEAL.] E. H. APODACA,

*Notary Public.*

My commission expires Oct. 25, 1917.

289 In the United States District Court for the District of Arizona.

JOSEPH B. HAMMER, Plaintiff,

vs.

THE ARIZONA COPPER COMPANY, LIMITED (a Corporation), Defendant.

*Affidavit of Paul Hammer.*

STATE OF ARIZONA,  
County of Greenlee, ss:

Paul Hammer, being first duly sworn says: that for the past four years he has resided at said Greenlee County, and during the

year 1914, he lived at Clifton, in said county, and was an employee of defendant corporation; that he is of the age of 24 years, and is a son of the plaintiff herein; that during December 1914, one Harry Neilson was an employee of said defendant, and held a position with it as foreman of repairs at its smelter at Clifton, Arizona, that on the evening of December 28th, 1914, affiant was making inquiry as to the circumstances of the injury that the plaintiff received at the smelter on December 28th, 1914, by being burned by calcine at said smelter and one person affiant asked was said Harry Neilson, and said Neilson replied as follows to such inquiry, to-wit:

"I was not right there at the time, but came up later, but that Elmer Bentley was present when Mr. Hammer (meaning the plaintiff) received his injury, and that Elmer Bentley could tell me (this affiant) more about the injury that Mr. Hammer received by being burned with hot calcine. That Bentley was there first."

That the said Bentley herein mentioned was a witness on the trial of said cause, and whose full name is Elmer Benton Bentley. That said Harry Neilson sometimes spells his name Harry Neilson.

PAUL HAMMER.

Subscribed and sworn to before me this 14th day of January, 1916.

My Commission expires Feb. 15, 1916.

[NOTARIAL SEAL.]

L. KEARNEY.

*Notary Public.*

290 In the United States District Court for the District of Arizona.

JOSEPH B. HAMMER, Plaintiff,

vs.

THE ARIZONA COPPER COMPANY, LIMITED (a Corporation), Defendant.

*Affidavit Jane E. Hammer.*

STATE OF ARIZONA,

*County of Greenlee, ss:*

I, Jane E. Hammer, being first duly sworn, depose and say: that I reside at Morenic, Arizona, am wife of above-named plaintiff, my age is 51 years; that during the year 1914, I was living at Clifton, Arizona; that I am well acquainted with one Harry Neilson, who is an employe of said defendant, and whose affidavit I am informed has been filed in this action in support of the petition of the defendant for a new trial of said cause; that on December 28th, 1914, the plaintiff was working for said defendant at its smelter at Clifton, Arizona, and was doing repair work on a hopper at said smelter, as I am informed and believe; that on December 28th, 1914, at about 2:25 p. m., of that day the said Harry Neilson with others brought the plaintiff to the Arizona Copper Company's hos-

pital close to where my dwelling was situated, the plaintiff was brought in on a push car to said hospital, and said Harry Neilson was with those who brought the plaintiff in, and I had heard a short time before that time that the plaintiff had been seriously injured by burns, and I was at the front of the hospital to see my husband, the plaintiff, and find how severely he had been injured and how he came to be injured, and when I came up to the front of the hospital I learned that the plaintiff had already been taken into the hospital, and just as I came up to the hospital the said Harry Neilson and my son Albert Hammer came out of the hospital where they had taken the plaintiff, and I then asked Harry Neilson, "if Mr. Hammer was burned very badly and how it happened," and Mr. Neilson said to me in answer to that question, "I do not just know, I was not there at the time, that I went over to help Mr. Bentley cut the clothing off of Mr. Hammer, when I heard Mr. Hammer hollowing, and then Mr. Bentley called me to help cut the clothing off of Mr. Hammer." The said Bentley is known as Elmer Bentley and was a witness on said trial.

JANE E. HAMMER.

Subscribed and sworn to before me this 25th day of January, 1916.

My Commission expires October 25th, 1917.

[NOTARIAL SEAL.]

E. H. APODACA,

*Notary Public.*

In the District Court of the United States for the District of Arizona.

JOSEPH B. HAMMER, Plaintiff,

vs.

THE ARIZONA COPPER COMPANY, LIMITED (a Corporation), Defendant.

*Affidavit Albert L. Hammer.*

STATE OF OHIO,

*County of Franklin,*

*City of Columbus, ss:*

I, Albert L. Hammer, being duly sworn, say: That my name is Albert L. Hammer, my age is 25 years, am a son of above named plaintiff, that I presently reside at Columbus, Ohio, During the year 1914, I lived at Clifton, Arizona, and was employed in the general office of said defendant; that I am well acquainted with Harry Neilson, who is an employee of said defendant and during the year 1914, he had charge of repairs for defendant at its smelter at Clifton, Arizona. On December 28th, 1914, at about 2 p. m., a 'phone message came into the office where I was working for defendant at said Clifton, stating that Mr. Hammer, (plaintiff above named), had been badly burned, and that he was being taken to the A. C. Co. hospital. I started for the hospital and reached it about 2:20 p. m., when said Harry Neilson and others

arrived, bringing Mr. Hammer (plaintiff) on a push car, and he was taken from the car into the hospital, he was in a very bad condition and suffering greatly from burns, and I there asked said Harry Neilson how the accident occurred, and said Harry Neilson then stated in answer to my question as follows:

"I do not know, I was not present when he got burned. I was attracted by cries and I arrived after Mr. Hammer had gotten out of the pit, and I found Bentley there who asked me to help cut the clothes off of Mr. Hammer, I assisted in cutting his clothes off, and I helped to bring him to the hospital. Bentley was the first to reach Mr. Hammer and he can give you all particulars."

The Bentley above named I know as Elmer Bentley, he is a mechanic, was an employ of defendant at said smelter at time of said injury, and as I have been informed was a witness on the trial of said cause at Tucson, Arizona.

ALBERT L. HAMMER.

Subscribed and sworn to before me this 29th day of January, 1916.  
My Commission expires Nov. 7th, 1918.

[NOTARIAL SEAL.]

JOSEPH F. BURXLEY,  
*Notary Public.*

293 Be it further remembered that on the 28th day of February, A. D., 1916, a juridical day of the November term of the above entitled court, during which said time judgment in the above entitled cause was rendered, plaintiff's said petition for new trial came on to be heard upon said petition and upon the said affidavits filed in support and contravention thereof. The plaintiff being represented by F. E. Curley, his attorney, and the defendant by W. C. McFarland and H. A. Elliott, its attorneys, That upon argument of the respective parties, defendant's said petition for new trial was taken under advisement by the court.

Be it further remembered that on the 29th day of February, A. D., 1916, the same being within the said November term of said court, the above entitled court by its order duly made and entered, denied defendant's said petition for new trial, to which order and ruling of the court, this defendant then and there excepted and now excepts.

Respectfully submitted:

W. C. McFARLAND,  
H. A. ELLIOTT,  
*Attorneys for Defendant.*

294 Received copy of the within defendant's proposed bill of exceptions, this 1st day of March, A. D., 1916.

FRANK E. CURLEY,  
*Attorney for Plaintiff.*

The court is in doubt as to the right of defendant to have a bill of exceptions reviewing the action of the United States District Court in and for the District of Arizona in overruling defendant's peti-

tion for a new trial, but will leave the question for the Supreme Court of the United States to pass upon. With this expression of doubt the foregoing defendant's proposed bill of exceptions is allowed and approved this 4th day of March, 1916, said day being one of juridical days of the November term of this court, being the term within which the judgment of this court in the foregoing cause was entered.

WM. H. SAWTELL, *Judge.*

295 THE UNITED STATES OF AMERICA,  
*State of Arizona, County of Pima, ss:*

This is to certify that the foregoing and herein incorporated affidavits of T. M. Vaughan, Elizabeth Vaughan, W. C. Marshall, A. B. Jones, Charles Bond, George W. Fraser, O. A. Risdon, Estanislado Sierra, J. G. Cooper, H. A. Elliott, Harry Neilson, Fred H. Hill, H. Halter and R. F. Sellers, Elmer Benton Bentley, Joseph B. Hammer, L. Kearney, Paul Hammer, Jane E. Hammer and Albert L. Hammer are full proof and correct copies of the affidavits and all the affidavits filed by the respective parties in the above entitled action in support and contravention of defendant's petition for new trial as the same are on record in my office in the matter of the above entitled action.

Given under my hand and seal of office this 2nd day of March, A. D., 1916.

[Seal of Court.]

MOSE DRACHMAN, *Clerk.*

Endorsements: In the United States District Court in and for the District of Arizona. Joseph B. Hammer, Plaintiff, vs. The Arizona Copper Company, Limited, a corporation, Defendant. No. 39 Tucson. Defendant's Proposed Bill of Exceptions. Filed this 4th day of March, 1916. Mose Drachman, Clerk, by Effie D. Botte, Deputy Clerk. W. C. McFarland, H. A. Elliott, Attorneys for Defendant, Clifton, Arizona.

296 In the District Court of the United States in and for the  
District of Arizona.

THE ARIZONA COPPER COMPANY, LIMITED, a Corporation, Plaintiff  
in Error,

vs.

JOSEPH B. HAMMER, Defendant in Error.

*Petition for Writ of Error.*

The above-named plaintiff in error, The Arizona Copper Company, Limited, a Corporation, respectfully shows that the above-entitled cause is now pending in the United States District Court, in and for the District of Arizona, and that judgment has therein been rendered, on the 27th day of November, A. D., 1915, upon a verdict of the jury, duly empanelled in the cause, and in favor of

the defendant in error, Joseph B. Hammer, and against The Arizona Copper Company, Limited, for the sum of Twelve Thousand (\$12,000) Dollars and costs; that on the 8th day of January, 1916, plaintiff in error, The Arizona Copper Company, Limited, filed its petition for a new trial in the above-entitled cause, which said petition for a new trial was by this court denied on the 29th day of February, 1916; and that this cause is a proper cause to be reviewed by the Supreme Court of the United States on writ of error.

Wherefore, The Arizona Copper Company, Limited, prays that a writ of error may issue in this behalf to said United States District Court, in and for the District of Arizona, and that the Clerk of said United States District Court, in and for the District of Arizona, be authorized and directed to sign, seal and issue said writ of error, and that said Clerk be further directed to send the records and

proceedings of this cause, with all things concerning the  
297 same, to the Supreme Court of the United States, in order that the errors complained of in the assignment of errors filed herewith by said plaintiff in error may be reviewed, and if error be found, corrected according to the laws and customs of the United States.

And your petitioner will ever pray.

W. C. McFARLAND,  
H. A. ELLIOTT,  
*Attorneys for Plaintiff in Error.*

Approved March 4th, 1916.

Petition granted and writ of error allowed on giving bond in the sum of Fifteen Thousand (\$15,000) Dollars, conditioned as the law directs, this 4th day of March, 1916.

WM. H. SAWTELLE,  
*Judge of the United States District Court  
in and for the District of Arizona.*

Endorsements: In the District Court of the United States for the District of Arizona, No. 39 Tucson. The Arizona Copper Company, Limited, a corporation, Plaintiff in Error, vs. Joseph B. Hammer, Defendant in Error. Assignment of Errors. Filed March 4, A. D., 1916. Mose Drachman, Clerk, by Effie D. Botts, Deputy Clerk. W. C. McFarland and H. A. Elliott, Attorneys for Plaintiff in Error.

298 In the District Court of the United States in and for the District of Arizona.

THE ARIZONA COPPER COMPANY, LIMITED, a Corporation, Plaintiff  
in Error,

vs.

JOSEPH B. HAMMER, Defendant in Error.

*Order Allowing Writ of Error from the Supreme Court of the United States and Fixing Amount of Supersedeas Bond.*

On this 4th day of March, 1916, came Plaintiff in Error, by W. C. McFarland and H. A. Elliott, its attorneys, and filed herein and presented to the Court its petition, praying for the allowance of a writ of error intended to be urged by it; praying also that a transcript of the record, and proceedings and papers in said cause, duly authenticated, may be sent to the Supreme Court of the United States, and that such other and further proceedings may be had as may be proper in the premises.

In consideration whereof said writ of error is allowed upon said Plaintiff in Error giving a bond according to law in the sum of Fifteen Thousand (\$15,000) Dollars, which shall operate as a supersedeas bond.

And it is further ordered that said petition is hereby allowed and granted, and that the writ of error be allowed in said cause, returnable before the Supreme Court of the United States on the 1st day of May, 1916, and that the Clerk of this court is authorized and directed to sign and seal the writ, and that a transcript of all proceedings and papers in said cause shall be made and transmitted to the United States Supreme Court.

It is further ordered that all proceedings herein be stayed until determination of said writ of error by said Supreme Court of the United States.

WM. H. SAWTELLE,

*Judge of the District Court of the United States  
in and for the District of Arizona.*

299 Service of the within order for a writ of error by receipt of true copy admitted this, the 4 day of March, 1916.

FRANK E. CURLEY,

*Attorney for Defendant in Error.*

Endorsements: No. 39 Tucson. In the District Court of the United States in and for the District of Arizona. The Arizona Copper Company, Limited, a corporation, Plaintiff in Error, vs. Joseph B. Hammer, Defendant in Error. Order allowing writ of error from the Supreme Court of the United States and fixing amount of Supersedeas Bond. W. C. McFarland and H. A. Elliott, Attorneys for Plaintiff in Error. Filed March 4, A. D., 1916. Mose Drachman, Clerk, by Effie D. Botts, Deputy Clerk.



300 In the District Court of the United States in and for the  
District of Arizona.

THE ARIZONA COPPER COMPANY, LIMITED, a Corporation, Plaintiff  
in Error,

VS.

JOSEPH B. HAMMER, Defendant in Error.

*Assignment of Errors.*

Comes now The Arizona Copper Company, Limited, a Corporation, by its attorneys, W. C. McFarland and H. A. Elliott, and in connection with its petition for a writ of error herein, makes the following assignment of errors, which it will urge upon the prosecution of the said writ of error in the above-entitled cause, to-wit:

I.

Because the court erred in overruling plaintiff in error's general demurrer, demurring to defendant in error's amended complaint, on the ground that said amended complaint does not state facts sufficient to constitute a cause of action against the plaintiff in error.

II.

Because the Court erred in overruling plaintiff in error's special demurrer No. 3, demurring to defendant in error's amended complaint on the ground that it appears in and by the allegations of said complaint that if this defendant in error has any cause of action against this plaintiff in error, it is by reason of the negligence of this plaintiff in error, its servants, employees or other agents, and not by reason of an accident or accidents to this defendant in error in the course of work in his employment or occupation as  
in said complaint alleged, arising out of and in the course of  
301 his labor, service and employment and due to a condition  
or conditions of his said occupation or employment.

III.

Because the court erred in overruling plaintiff in error's special demurrer No. 4, demurring to defendant in error's amended complaint on the ground that if it be held by this court that defendant in error's complaint contains allegations sufficient to constitute a cause of action under the provisions or any thereof of said Chapter 6 of Title 14 of the Revised Statutes of the State of Arizona, 1913, this defendant in error has nevertheless attempted to set forth in his said complaint a cause of action, the sufficiency of which is not admitted, but expressly denied, under the common law or the law otherwise, than as provided by said Chapter 6 of said Title 14 in this particular, namely; alleged injury or injuries to this defendant in error by reason of the negligence of this plaintiff in

error, its servants, employees or other agents by reason of which several causes of action are improperly united in defendant in error's complaint.

#### IV.

Because the court erred in overruling plaintiff in error's special demurrer No. 6, demurring to defendant in error's amended complaint, on the ground that it appears in said complaint that the alleged injury or injuries of this defendant in error, if any there were, were occasioned wholly by, and resulted from the usual and ordinary risks of the employment in which defendant in error was engaged at the time and place of the said alleged injury or injuries as in said complaint described, and were wholly assumed by this defendant in error in entering upon and continuing in said employment, and that said risks were wholly known to and  
302 appreciated by said defendant in error in entering on and continuing in said employment, or by the exercise of reasonable diligence on the part of this defendant in error, could have been fully known to and appreciated by him.

#### V.

Because the court erred in overruling plaintiff in error's special demurrer No. 9, demurring to defendant in error's amended complaint on the ground, that it appears upon the face of the said complaint that defendant in error seeks to recover judgment against the plaintiff in error under and by virtue of Chapter 6, Title 14, Revised Statutes of Arizona, 1913, known as the Employers' Liability Act, enacted pursuant to the provisions of Section 7 of Article 18 of the Constitution of the State of Arizona, without any charge or showing of negligence, wrong or default on the part of this plaintiff in error, causing or contributing to defendant in error's alleged injury, and that said Employers' Liability Act, and said Section 7 of Article 18 of the Constitution of Arizona are in contravention and violation of the Constitution of the United States, particularly the 14th Amendment thereto, in that they seek to deprive this plaintiff in error of its property without due process of law, and deny it the equal protection of the laws of the State of Arizona by subjecting it to the unlimited liability for damages for personal injuries suffered by its employee without any fault, wrong or negligence on the part of this plaintiff in error, causing such injuries or contributing thereto.

#### VI.

Because the court erred in overruling plaintiff in error's special demurrer No. 10, demurring to defendant in error's amended complaint on the ground that it appears on the face of said complaint, and the records so show in this cause, that defendant in error  
303 seeks to recover judgment against plaintiff in error under and by virtue of the provisions of Chapter 6 of Title 14 of the Civil Code, the Revised Statutes of Arizona, 1913, known as the Employers' Liability Law, and that said Employers' Liability Law

is in violation and contravention of the Constitution of the State of Arizona, and particularly of Sections 5 and 7 of Article 18 thereof, in that said Employers' Liability Law attempts to give the defendant in error the right to recover damages from plaintiff in error in this action, notwithstanding the injuries for which said damages were claimed were contributed to or in part caused by defendant in error's own negligence, and attempts to deprive plaintiff in error of the right to wholly defeat this action by showing said injuries were contributed to and in part caused by defendant in error's own negligence.

## VII.

Because the court erred in granting defendant in error's oral motion to strike that part of plaintiff in error's amended answer, being that part of Paragraph 7 on Page 13 of said answer as follows:

"Defendant is now informed and believes and upon such information and belief asserts the fact to be, that this plaintiff while so engaged upon said other and similar work, was from time to time interrupted by the operation of said calcine car, that at each of said interruptions said calcine car was stopped before running by and over the place where plaintiff was so engaged, that plaintiff was on each of said occasions warned of the approach of said car, and upon each of said occasions, well knowing the danger attendance upon remaining below said fettling floor and below and between said broad gauge tracks, while said car was operated over and above plaintiff, promptly accepted said warning and withdrew from said place of danger to a place of safety."

## VIII.

Because the court erred in sustaining defendant in error's demurrer to Paragraph II, Pages 13 and 14 of plaintiff in error's amended answer, said paragraph being as follows:

304 "Further answering said complaint, defendant alleges that by reason of the matters and things hereinabove set forth, the claimed injury or injuries of plaintiff, if any there were, either as alleged in said complaint or otherwise, were occasioned wholly by, and resulted from the usual and ordinary risks and from the unusual and extraordinary risks, deliberately, voluntarily, negligently and carelessly assumed by plaintiff, of the employment in which plaintiff was engaged at said time and place of his said injury or injuries, which said risks were wholly assumed by plaintiff by entering upon and continuing in said employment."

"That said risks were wholly known to and appreciated by said plaintiff in entering upon and continuing in said employment, or by the exercise of reasonable diligence on the part of plaintiff should have been fully known to and appreciated by him, and that said injury or injuries did not in any respect, or at all, result from, or were in any degree occasioned by any neglect or default on the part of this defendant, either as alleged in said complaint or otherwise."

## IX.

Because the court erred in sustaining defendant in error's demurrer to Paragraph III, Page 14 of Plaintiff in error's amended answer, said paragraph being as follows:

"Further answering, defendant further asserts that plaintiff's said injury or injuries did not in any respect or at all result from, or were in any degree occasioned by any neglect or default on the part of the defendant, its officers, servants, employees or other agents, either as alleged in said complaint or otherwise; that if it be held that plaintiff may maintain this action or may recover anything herein against this defendant, entirely without fault, this defendant would thereby be deprived of its property without due process of law, and would thereby be denied the equal protection of the laws of the State of Arizona, all of which is contrary to the Constitution of the State of Arizona, and to the Fourteenth Amendment of the Constitution of the United States of America."

## X.

Because the court erred in permitting defendant in error to amend its amended complaint during the course of the trial in the particular of alleging in and by such last mentioned amendment, direct and resulting injuries to the defendant in error's stomach, not having been set forth or claimed in defendant in error's original complaint or in defendant in error's amended complaint.

## XI.

305 Because the court erred in permitting the defendant in error, over the objection of the plaintiff in error, to testify as to the amount of wages earned and received by him at other times and places prior to his injury.

## XII.

Because the court erred in permitting defendant in error to testify over the objection of this plaintiff in error as to what was the prevailing wage at the time of the trial in Greenlee County for the class of work that defendant in error was performing at the time he was injured.

## XIII.

Because the court erred in sustaining defendant in error's objection to and excluding the testimony of witness Estanislado Provincio, offered by the plaintiff in error as to his habit and custom of stopping the calcine car operated by witness, if he did so stop it any distance from the hopper in which Mr. Hammer, the defendant in error, was engaged in work.

Because the court further erred in sustaining defendant in error's objection to and excluding the testimony of last said witness offered

by the plaintiff in error as to what he did in reference to stopping his car when he approached a hopper in which Mr. Hammer was engaged at work.

#### XIV.

Because the court erred in overruling plaintiff in error's objections to and admitting the testimony of witness Estanislado Provencio on cross examination by defendant in error viz: that if the door on the calcine car was properly closed the car would have passed over where Hammer, the defendant in error, was at work without injuring him any—wouldn't have burned him because no calcine would have poured down.

#### XV.

Because the court erred in sustaining defendant in error's objection to and excluding that certain blue-print map offered in evidence by plaintiff in error and subsequently filed and marked for identification.

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#### XVI.

Because the Court erred in overruling plaintiff in error's objections to and permitting the testimony of witness, Elmer Bentley, offered by defendant in error in rebuttal; viz: a conversation between witness and one Mauro Provencio, wherein the said Mauro Provencio told witness that the reason that the calcine car did not stop, was that the brakes on the calcine car would not work, or words to that effect.

#### XVII.

The Court erred in denying plaintiff in error's motion for a directed verdict in behalf of the plaintiff in error.

#### XVIII.

Because the court erred in refusing to give to the jury the following instruction requested by plaintiff in error, and refused by the court:

"If you believe from the evidence that there is a comparatively safe method of placing these angle irons on the hopper and also a more dangerous one of placing the angle irons on this hopper by getting down into the hopper, and that these two methods were known to plaintiff at the time he undertook to place angle irons on top of the hopper in which he was injured, and if you believe from the evidence that he voluntarily selected the more dangerous method and the selection of the dangerous method in any degree contributed to the accident and injury, then I instruct you that he is guilty of contributory negligence, as hereinbefore defined, and cannot recover in this action, and your verdict should be for the defendant."

## XIX.

Because the court erred in refusing to give to the jury the following instruction requested by the plaintiff in error and refused by the court:

"If the jury believe from the evidence that plaintiff was instructed by defendant that the proper and safe method to place the angle irons on the top of the hopper or hoppers was to place same from the top of the feed floor, and that plaintiff failed and refused to pursue the method directed by defendant and voluntarily adopted the method of placing said angle irons by getting down into the hopper, and the method selected by him in any way caused or contributed to the accident and injury as alleged in his complaint, then I charge you plaintiff cannot recover."

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## XX.

Because the court erred in refusing to give to the jury the following instruction requested by the plaintiff in error and refused by the court:

"The law imposes upon every person the duty of using ordinary care for his own personal protection against injury; this is what the courts mean when they say contributory negligence will defeat a recovery."

## XXI.

Because the court erred in refusing to give to the jury the following instruction requested by the plaintiff in error and refused by the court:

"I charge you that what the law means by "Contributory Negligence" is a want of ordinary care on the part of the person injured, which contributed in any degree to the injury, and without which the injury would not have happened, and that such act or omission was not such a one as would have been done or omitted by a person of ordinary prudence under the same or like circumstances, then I instruct you that the plaintiff cannot recover and your verdict should be for the defendant."

## XXII.

Because the court erred in refusing to give to the jury the following instruction requested by the plaintiff in error, and refused by the court:

"You are further instructed that the law under which this action is brought bases the liability of the defendant for damages solely upon the fact that the accident and resulting injury were due to a condition or conditions of a hazardous occupation of an employee in the service of such employer in such hazardous occupation. If you are satisfied from the evidence in the cause that the accident and resulting injury were due to a condition or conditions of such

occupation, while plaintiff was in the service of defendant in such hazardous occupation, yet plaintiff would not be entitled to recover in this action in such a situation unless the evidence in the cause further satisfies you that said accident and injury were not due in any degree to the negligence of the plaintiff."

### XXIII.

Because there was misconduct in the proceedings of the prevailing party in this:

L. Kearney, Esq., attorney for defendant in error herein, in his closing argument before the jury and while discussing the evidence in the cause said: "Even if Hammer had remained in the  
308 hopper and refused to get out as claimed by the defendant, nevertheless Hammer would not have been injured if the car had been in proper condition, and if it had not been for the negligence of the defendant in running the car over the hopper and spilling the calcine on him," or words to that purport and effect. To which remarks of counsel, plaintiff in error then and there objected.

That the court erred in refusing to withdraw said remarks from the jury, or in refusing to admonish the jury to disregard said remarks. To which action of the court, plaintiff in error then and there excepted, which exception was allowed by the court.

### XXIV.

Because the evidence at the trial was insufficient to justify the verdict of the jury in this; viz:

(a) Because the evidence in the case shows that if the defendant in error received any injury at all on the day or date alleged in his complaint, that such injury was the result directly and proximately of his own negligence.

(b) Because the evidence in the cause shows by a preponderance thereof, that the negligence of the defendant in error contributed directly and proximately to the injury alleged in said complaint.

(c) Because the evidence introduced by the plaintiff in error in this action in respect to the alleged injury of defendant in error showed without exception that the injury to defendant in error was caused by the negligence of defendant in error, in this: that defendant in error was duly and timely informed and warned of the approach of the calcine car from which spilled the hot calcine, producing said injury and that defendant in error knew and appreciated such warning, but negligently refused to heed the same and get out of the hopper in which he was working, and assume a place  
of safety; and that all the evidence introduced by the defend-  
309 ant in error in this action shows, if such evidence be taken to be true, that defendant in error in the course of work in his employment or occupation, arising out of and in the course of defendant in error's labor, service and employment and due to a condition or conditions of defendant in error's said occupation or



employment, as alleged and set forth in defendant in error's complaint and as expressly avowed by defendant in error in open Court, but was due to the negligence of this plaintiff in error, its officers, servants, employees or other agents, in this: viz: that if the evidence introduced by the defendant in error be taken to be true, the injury to the defendant in error was due solely,

1st. To a defective and improperly repaired calcine car, from which the calcine spilled upon defendant in error:

2nd. To the negligent failure of the employee of this plaintiff in error in charge of said car to stop the same upon approaching the hopper in which defendant in error was at work and give the defendant in error an opportunity to get out of said hopper and assume a place of safety.

## XXV.

Because the damages assessed by the jury are excessive.

## XXVI.

Because the verdict of the jury is against the law.

## XXVII.

Because under the law and the evidence in the cause, the verdict and judgment should be for the plaintiff in error.

## XXVIII.

That the United States District Court, in and for the District of Arizona, erred in overruling and denying the petition for a new trial filed therein by plaintiff in error, for the reason that in and by said petition for a new trial, said plaintiff in error set forth certain newly discovered evidence, and supported the same with  
310 sworn affidavits, as required by law and the rules of the court; which said newly discovered evidence, was, in point of fact, new evidence, and not cumulative, and as plaintiff in error believes, would, upon a retrial of this cause, result in changing the verdict of the jury in favor of plaintiff in error.

Wherefore plaintiff in error prays that the judgment of said court be reversed.

W. C. McFARLAND,

... H. A. ELLIOTT,

*Attorneys for the Arizona Copper Company,  
Limited, Plaintiff in Error.*

Received copy within petition for writ of error and assignments of error this 4th day of March, 1916.

FRANK E. CURLEY,  
*Attorney for Defendant in Error.*

Endorsements: No. 39 Tucson. In the District Court of the United States for the District of Arizona. The Arizona Copper Company, Limited, a corporation, plaintiff in error, vs. Joseph B. Hammer, defendant in error. Petition for Writ of Error. Assignment of Errors. Filed March 4, A. D., 1916. Mose Drachman, Clerk, by Effie D. Botts, Deputy Clerk. W. C. McFarland and H. A. Elliott, Attorneys for Plaintiff in Error.

311 In the District Court of the United States in and for the District of Arizona.

THE ARIZONA COPPER COMPANY, LIMITED, a Corporation, Plaintiff in Error,

vs.

JOSEPH B. HAMMER, Defendant in Error.

*Bond of Writ of Error from Supreme Court of the United States.*

Know all Men by these Presents The The Arizona Copper Company, Limited, a corporation, Plaintiff in Error above-named, as principal, and American Surety Company of New York, a corporation, organized and existing under and by virtue of the laws of the State of New York, and authorized to do business as a surety company in the State of Arizona, as surety, are held and firmly bound unto Joseph B. Hammer, Defendant in Error, above-named, in the full and just sum of Fifteen Thousand (\$15,000) Dollars, to be paid to the said Defendant in Error, to which payment well and truly to be made, the said principal binds itself, its successors and assigns jointly and severally, firmly by these presents.

Witness: the names and seals of the said principal and surety, this 3rd day of March, 1916.

The condition of the above obligation is such that whereas, at a session of the United States District Court, in and for the District of Arizona, in a suit pending in said court between The Arizona Copper Company, Limited, a corporation, Plaintiff in Error,

312 and Joseph B. Hammer, Defendant in Error, said United States District Court, in and for the District of Arizona, rendered a final judgment upon a verdict of the jury, duly empaneled in said cause; said judgment by said District Court being in favor of said Joseph B. Hammer and against said The Arizona Copper Company, Limited, and being for the sum of Twelve Thousand (\$12,000) Dollars with costs; and

Whereas, the said Plaintiff in Error obtained a writ or error to reverse the judgment of said United States District Court, in and for the District of Arizona, and filed a copy thereof in the Clerk's Office in said Court, and a citation directed to said Joseph B. Hammer, Defendant in Error, citing and admonishing the said Defendant in Error to be and appear before the Supreme Court of the United States.

Now, if the said, The Arizona Copper Company, Limited, shall

prosecute its writ of error to effect, and shall answer all damages and costs that may be awarded against it, if it fails to make its plea good, then the above obligation is to be void; otherwise to remain in full force and effect.

THE ARIZONA COPPER COMPANY, LIMITED,  
By W. C. McFARLAND,  
*Its General Attorney, Principal.*  
AMERICAN SURETY COMPANY OF NEW YORK,  
*A Corporation Organized and Existing under  
and by Virtue of the Laws of the State of  
New York and Authorized to do Business as  
a Surety Company in the State of Arizona,*  
By H. E. HEIGHTON,  
*Attorney in Fact, Surety.*

Countersigned by  
[Seal of Surety.]

RALPH W. LANGWORTHY.

313      Approved this 4th day of March, A. D., 1916.  
WM. H. SAWTELLE,  
*Judge of the United States District Court  
in and for the District of Arizona.*

Endorsements: No. 39 Tucson. In the District Court of the United States, in and for the District of Arizona. The Arizona Copper Company, Limited, a corporation, Plaintiff in Error, vs. Joseph B. Hammer, Defendant in Error. Bond of Writ of Error from Supreme Court of United States. Copy received M'ch 4, 1916. Frank E. Curley, Att'y for Def't in Error. W. C. McFarland and H. A. Elliott, Attornesy for Plaintiff in Error. Filed March 4, A. D., 1916, Mose Drachman, Clerk, by Effie D. Botts, Deputy Clerk.

314      In the United States District Court in and for the District of Arizona.

THE ARIZONA COPPER COMPANY, LIMITED, a Corporation, Plaintiff  
in Error,

vs.

JOSEPH B. HAMMER, Defendant in Error.

*Præcipe.*

To the Clerk of Said Court:

Sir: Please issue a single certified transcript of the record on return to Writ of Error taken by plaintiff in error from the Supreme Court of the United States in the above entitled cause, consisting of the following:

1. Amended Complaint.
2. Summons and Return.
3. First Amended Answer.
4. Transcript of Minute Entries.

5. Verdict of Jury.
6. Judgment.
7. Bills of Exceptions.
8. Petition for Writ of Error.
9. Assignment of Error.
10. Bond and approval thereof given on Writ of Error.
11. Order allowing Writ of Error.
12. Writ of Error.
13. Citation in Error.

W. C. McFARLAND,  
H. A. ELLIOTT,  
*Attorneys for Plaintiff in Error.*

315      Endorsements: No. 39 Tucson. In the United States District Court in and for the District of Arizona. The Arizona Copper Company, Limited, a corporation, Plaintiff in Error, vs. Joseph B. Hammer, Defendant in Error. *Præcipe*. Filed this 4th day of March, 1916. Mose Drachman, Clerk, by Effie D. Botts, Deputy Clerk. Service of within *Præcipe* by true copy admitted this 4th day of March, 1916. Frank E. Curley, Attorney for Defendant in Error. W. C. McFarland, H. A. Elliott, Attorneys for Plaintiff in Error, Clifton, Arizona.

316      *Certificate of Clerk U. S. District Court to Transcript of Record.*

In the United States District Court for the District of Arizona.

No. 39, Tucson.

THE ARIZONA COPPER COMPANY, LIMITED, a Corporation, Plaintiff  
in Error,

vs.

JOSEPH B. HAMMER, Defendant in Error.

UNITED STATES OF AMERICA,  
*District of Arizona, ss:*

I, Mose Drachman, Clerk of the United States District Court for the District of Arizona, do hereby certify that the foregoing pages, number 1 to 315, inclusive, constitute and are a true, complete and correct copy of the record, pleadings, and proceedings had in the case of Joseph B. Hammer, Plaintiff, vs. The Arizona Copper Company, Limited, a corporation, defendant, No. 39 (Tucson) in this Court, as the same remain on file and of record in said District Court, and I also annex and transmit the original Writ of Error, and Citation, in said action.

I further certify that the cost of preparing and certifying to said record amounts to the sum of \$353.50 and that the same has been paid in full by the plaintiff in error, The Arizona Copper Company, Limited, a corporation.

In testimony whereof, I have hereunto set my hand and affixed the seal of the United States District Court for the District of Arizona at Tucson, in said District, this twenty-fourth day of April, in the year of our Lord one thousand nine hundred and six-  
 317 teen, and of the Independence of the United States of America, the one hundred and fortieth.

[Seal United States District Court, District of Arizona.]

MOSE DRACHMAN,  
*Clerk United States District Court,*  
*District of Arizona,*  
 By EFFIE D. BOTTS,  
*Deputy Clerk.*

318 In the District Court of the United States in and for the District of Arizona.

THE ARIZONA COPPER COMPANY, LIMITED, a Corporation,  
 Plaintiff in Error,

vs.

JOSEPH B. HAMMER, Defendant in Error.

*Writ of Error.*

THE UNITED STATES OF AMERICA, ss:

The President of the United States of America to the United States District Court in and for the District of Arizona, and the Honorable Judge thereof, Greeting:

Because in the records and proceedings, as also in the rendition of the judgment, of a plea, which is in said United States District Court, in and for the District of Arizona, between the Arizona Copper Company, Limited, a Corporation, Plaintiff in Error, and Joseph B. Hammer, Defendant in Error, and manifest error hath appeared to the great damage of said Plaintiff in Error, as by its complaint appears; and it being fit, and we being willing that the error, if any there hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf:

You are hereby commanded, if judgment be therein given, that then under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same, to this, the Supreme Court of the United States, together with this writ, so you have the same in the said Supreme Court at Washington, D. C., within sixty days from the date hereof, that the records and proceedings aforesaid being inspected, the Supreme Court may cause further to be done herein to correct that error, what of right and according to the law and customs of the United States, should be done.

319 Witness: The Honorable Edward Douglass White, Chief Justice of the United States Supreme Court, this 4th day of 18—1002

March, in the year of our Lord, One Thousand, Nine Hundred and Sixteen.

[Seal United States District Court, District of Arizona.]

MOSE DRACHMAN,  
Clerk of the United States District Court  
in and for the District of Arizona.  
By EFFIE D. BOTTS,

*Deputy Clerk.*

Allowed by  
WM H. SAWTELLE,  
Judge of the United States District Court  
in and for the District of Arizona.

Service of within writ of error by receipt of true copy admitted,  
this, the 4 day of March, 1916.

FRANK E. CURLEY,  
*Attorney for Defendant in Error.*

[Endorsed:] No. 39, Tucson. In the District Court of the United States in and for the District of Arizona. The Arizona Copper Company, Limited, a Corporation, Plaintiff in Error, vs. Joseph B. Hammer, Defendant in Error. Order. W. C. McFarland and H. A. Elliott, Attorneys for Plaintiff in Error. Filed March 4, A. D. 1916. Mose Drachman, Clerk, by Effie D. Botts, Deputy Clerk.

320 In the District Court of the United States in and for the District of Arizona.

THE ARIZONA COPPER COMPANY, LIMITED, a Corporation,  
Plaintiff in Error,  
vs.

JOSEPH B. HAMMER, Defendant in Error.

*Citation.*

UNITED STATES OF AMERICA, ss:

The President of the United States of America to Joseph B. Hammer, and to L. Kearney and Frank E. Curley, your attorneys,  
Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States at Washington, D. C., on the 1st day of May, 1916, pursuant to a writ of error filed in the Clerk's Office of the United States District Court, in and for the District of Arizona, wherein The Arizona Copper Company, Limited, is Plaintiff in Error and you, Joseph B. Hammer, are Defendant in Error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness: The Honorable William H. Sawtelle, Judge of the United States District Court, in and for the District of Arizona, this 4th day of March, A. D., 1916.

WM. H. SAWTELLE,  
*Judge of the United States District Court  
in and for the District of Arizona.*

321      Service of the within citation by receipt of a true copy admitted this 4 day of March, 1916.

FRANK E. CURLEY,  
*Attorney for Defendant in Error.*

[Endorsed]: No. 39 Tucson. In the District Court of the United States, in and for the District of Arizona. The Arizona Copper Company, Limited, a Corporation, Plaintiff in Error, vs. Joseph B. Hammer, Defendant in Error. Citation. W. C. McFarland and H. A. Elliott, Attorneys for Plaintiff in Error. Filed March 4, A. D. 1916. Mose Drachman, Clerk, by Effie D. Botts, Deputy Clerk.

Endorsed on cover: File No. 25,285. Arizona. D. C. U. S. Term No. 1002. The Arizona Copper Company, Limited, plaintiff in error, vs. Joseph B. Hammer. Filed May 9th, 1916. File No. 25,285.



IN THE  
**Supreme Court of United States**  
OCTOBER TERM, 1916.

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THE ARIZONA COPPER COM- PANY, Limited,  v. JOSEPH B. HAMMER, <i>Defendant in Error.</i>	}	No. 477.
<i>Plaintiff in Error,</i>		

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**MOTION TO DISMISS AND TO AFFIRM  
AND BRIEF IN SUPPORT THEREOF.**

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MOTION.

Comes now the defendant in error above named and moves this Honorable Court to dismiss the writ of error and appeal herein, upon the following grounds:

(1) For want of jurisdiction in this court to entertain said appeal.

(2) Because no appeal herein was taken or perfected within the time required by law, in that the order allowing the writ of error was on March 4, 1916, and the record herein was not filed in this court until May 9, 1916.

(3) Because the appellant claims as ground for appeal that the Employers' Liability Law, Chap. 6 of Title 14, Revised Statutes of Arizona, 1913, is in violation of Sections 5 and 7 of Article 18 of the Constitution of Arizona, which claim is unfounded, frivolous and presents no question for the consideration of this court.

(4) Because the appellant claims that the Employers' Liability Law, Chap. 6 of Title 14, Rev. Stat. Arizona, 1913, violates the fourteenth amendment of the Constitution of the United States, which is its sole excuse for this appeal, and which contention is frivolous and without merit, and on other grounds stated in the annexed brief.

That said defendant in error also moves this court to affirm the judgment of the district court upon the following grounds:

(a) On the grounds stated in No. 3 in above motion to dismiss, and on the further grounds, to-wit:

(b) That under the provisions of the Employers' Liability Law, Chap. 6 of Title 14, Revised Statutes of Arizona, 1913, in the United States District Court for the District of Arizona,

the plaintiff below recovered a judgment against the defendant for a personal injury, and that under the provisions of Sec. 238 of the Judicial Code of the United States the plaintiff in error has prosecuted an appeal from that judgment to this court under the claim that said Employers' Liability Law is in violation of the fourteenth amendment of the Constitution of the United States, which claim is untenable, without merit and is the sole excuse for the invocation of the appellate jurisdiction of this court, which in fact does not involve the construction of said Arizona law, and that only general questions of a non-federal character are presented for review, and no plain error, or error at all, was committed by the court below in trying the case, and that the questions on which the decision of the cause depend are so frivolous as not to require argument, and upon the further grounds stated in the annexed brief, and that it is manifest from the record of this cause that the writ is prosecuted only for delay, which is prejudicial to the rights of the defendant in error, in consequence of which the defendant in error respectfully prays that the judgment below be affirmed with damages as prescribed in Rule 23 of this court upon the affirmance of the judgment herein, and with 12 per cent interest as provided for by Sec. 3161 of said Arizona Statute, and in the event that said affirmance be not granted then defend-

ant in error prays that the cause be transferred for hearing to a summary docket.

Respectfully submitted,

FRANK H. HEREFORD AND

~~FRANK E. CURLEY,~~

Tucson, Arizona,

*Attorneys for Defendant in Error.*

Sirs:

Please take notice that the foregoing motions will be submitted to the court at the City of Washington, in the District of Columbia, on the 9th day of October, 1916, at the opening of the court on that day, or as soon thereafter as counsel can be heard.

Yours truly,

FRANK H. HEREFORD AND

~~FRANK E. CURLEY,~~

Tucson, Arizona,

*Attorneys for Defendant in Error.*

Dated this .... day of August, 1916.

To W. C. McFarland and H. A. Elliott,

Attorneys for Plaintiff in Error,

Clifton, Arizona.

IN THE  
**Supreme Court of United States**

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THE ARIZONA COPPER COM- PANY, Limited,  v. JOSEPH B. HAMMER,  <i>Plaintiff in Error,</i>  <i>Defendant in Error.</i>	}	No. 477.
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**MOTION TO DISMISS AND TO AFFIRM  
AND BRIEF IN SUPPORT THEREOF.**

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STATEMENT.

This is a motion under Rule VI to dismiss the writ of error and appeal, and to affirm the judgment herein.

The cause is here upon a writ of error directed to the District Court of the United States for the District of Arizona to review a judgment entered in said District Court.

The action was brought by Joseph B. Hammer as the plaintiff in the trial court against the plaintiff in error here, under the Employers' Liability Law, Chapter 6 of Title 14, Revised Statutes of Arizona, 1913, to recover damages for personal injuries received by him at Clifton, Arizona, while in the employ of plaintiff in error as a boiler maker at its smelter on December 28, 1914, and resulted in a judgment in favor of plaintiff below upon a verdict in the sum of \$12,166.45

The writ of error was allowed on March 4, 1916, (Transcript 274) and the record filed in this court on May 9, 1916, more than sixty days after allowance of writ.

#### CONSTITUTION OF ARIZONA.

Sections 4, 5, 6 and 7 of Article 18 of Constitution of Arizona, are as follows:

"Sec. 4. The common law doctrine of fellow servant, so far as it affects the liability of a master for injuries to his servant resulting from the acts or omissions of any other servant or servants of the common master is forever abrogated.

Sec. 5. The defense of contributory negligence or of assumption of risk shall, in all cases whatsoever, be questions of fact and shall, at all times, be left to the jury.

Sec. 6. The right of action to recover damages for injuries shall never be abrogated, and

the amount recovered shall not be subject to any statutory limitation.

Sec. 7. To protect the safety of employees in all hazardous occupations, in mining, smelting, manufacturing, railroad or street railway transportation, or in any other industry the legislature shall enact an *Employers' Liability Law*, by the terms of which any employer, whether individual, association or corporation shall be liable for the death or injury, caused by any accident due to a condition or conditions of such occupation, of any employee in the service of such employer in such hazardous occupation, in all cases in which such death or injury of such employee shall not have been caused by the negligence of the employee killed or injured."

The Employers' Liability Law, approved May 24, 1912, now known as Chapter 6 of Title 14, Rev. Stat. Ariz., 1913, so far as the same has any bearing on the questions at bar, is as follows:

"Sec. 3153. This chapter is and shall be declared to be an employers' liability law as prescribed in Section 7 of Article XVIII of the state constitution.

3154. That to protect the safety of employees in all hazardous occupations in mining, smelting, manufacturing, railroad, or street railway transportation, or any other industry, as provided in said Section 7 of Article XVIII of the state con-



stitution, any employer, whether individual, association, or corporation, shall be liable for the death or injury, caused by any accident due to a condition or conditions of such occupation, of any employee in the service of such employer in such hazardous occupation, in all cases in which such death or injury of such employee shall not have been caused by the negligence of the employee killed or injured.

3155. The labor and services of workmen at manual and mechanical labor, in the employment of any person, firm, association, company, or corporation, in the occupations enumerated in the next section hereof, are hereby declared and determined to be service in a hazardous occupation within the meaning of the terms of the preceding section.

By reason of the nature and conditions of, and the means used and provided for doing the work in, said occupations, such service is especially dangerous and hazardous to the workmen therein, because of risk and hazards which are inherent in such occupations and which are unavoidable by the workmen therein.

3156. The occupations hereby declared and determined to be hazardous within the meaning of this chapter are as follows:

(1) The operation of steam railroads, electric railroads, street railroads, by locomotives, engines, trains, motors, or cars of any kind pro-

pelled by steam, electricity, cable or other mechanical power, including the construction, use or repair of machinery, plants, tracks, switches, bridges, roadbeds, upon, over and by which such railway business is operated.

(2) All work when making, using or necessitating dangerous proximity to gunpowder, blasting powder, dynamite, compressed air or any other explosive.

(3) The erection or demolition of any bridge, building or structure in which there is, or in which the plans and specifications require, iron or steel frame work.

(4) The operation of all elevators, elevating machines or derricks or hoisting apparatus used within or on the outside of any bridge, building or other structure for conveying materials in connection with the erection or demolition of such bridge, building or structure.

(5) All work on ladders or scaffolds of any kind elevated twenty feet or more above the ground or floor beneath in the erection, construction, repair, painting or alteration of any building, bridge, structure or other work in which the same are used.

(6) All work of construction, operation, alteration or repair where wires, cables, switchboards, or other apparatus or machinery are in use charged with electrical current.

(7) All work in the construction, alteration, or repair of pole lines for telegraph, telephone or other purposes.

(8) All work in and about quarries, open pits, open cuts, mines, ore reduction works and smelters.

(9) All work in the construction and repair of tunnels, subways and viaducts.

(10) All work in mills, shops, works, yards, plants and factories where steam, electricity, or any other mechanical power is used to operate machinery and appliances in and about such premises.

3157. Every employer, whether individual, firm, association, company or corporation, employing workmen in such occupation, of itself or through an agent, shall by rules, regulations and instructions, inform all employees in such occupations as to the duties and restrictions of their employment, to the end of protecting the safety of employees in such employment.

3158. When in the course of work in any of the employments or occupations enumerated in the preceding section, personal injury or death by any accident arising out of and in the course of such labor, service and employment, and due to a condition or conditions of such occupation or employment, is caused to or suffered by any work-

man engaged therein, in all cases in which such injury or death of such employee shall not have been caused by the negligence of the employee killed or injured, then the employer of such employee shall be liable in damages to the employee injured, or, in case death ensues, to the personal representative of the deceased for the benefit of the surviving widow or husband and children of such employee; and, if none, then to such employee's parents; and, if none, then to the next of kin dependent upon such employee, and if none, then to his personal representative, for the benefit of the estate of the deceased.

3161. In all actions for damages brought under the provisions of this chapter, if the plaintiff be successful in obtaining judgment, and if the defendant appeals to a higher court, and if the plaintiff in the lower court be again successful; and the judgment of the lower court is sustained by the higher court or courts; then and in that event the plaintiff shall have added to the amount of such judgment by such higher court or courts, interest at the rate of 12 per cent per annum on the amount of such judgment from the date of the filing of the suit in the first instance until the full amount of such judgment is paid."

#### Point I.

It is obvious that the above statute conforms to the provisions of Sec. 7 of Article 18 of the

Constitution of Arizona, and is not open to the question that it violates the fourteenth amendment of United States Constitution. On such question an appeal was dismissed in case of *Easterling Lumber Company v. Pierce*, 235 U. S. 380, 59 L. ed. 279; *Jeffrey Mfg. Co. v. Blagg*, 235 U. S. 571, 59 L. ed. 364; *Brolan v. United States*, 236 U. S. 216, 59 L. ed. 545.

#### Point II.

Sec. 5 of Article 18 of Constitution of Arizona has no application to the Employers' Liability Law, but pertains to common law actions for negligence.

*Consolidated Arizona Smelting Co. v. Ujack*, 139 Pac. (Ariz.) 465.

#### Point III.

Of course the record was not filed in this court within the time required by law, and whether the court will dismiss for that reason or not is discretionary.

The real excuse for this case being in this court is the claim that the Arizona employers' liability law offends against the fourteenth amendment of the Constitution of the United States, which claim on the slightest inspection is so wholly wanting in merit as to be frivolous, and for that reason this court may decline to take jurisdiction and dismiss the writ of error and appeal, as was done in cases,

*Brolan v. United States*, 236 U. S. 216;  
*Goodrich v. Ferris*, 214 U. S. 71, 53 L. ed. 914;

*Arbuckle v. Blackburn*, 191 U. S. 405, 48 L. ed, 239;  
*Easterling Lbr. Co. v. Pierce*, 235 U. S. 279;  
*Vandalia Ry. Co. v. Stillwell*, 36 Sup. Ct. 445.

The same character of statute has many times been before this court for consideration, and before so many other courts that all questions as to their constitutionality may now be regarded as well settled, and furnishes no excuse for an appeal to this court on that ground, and that such statutes do not offend against the fourteenth amendment United States Constitution has been many times declared by this court.

*Northern Pacific Railway Co. v. Meese*, 239 U. S. 614;  
*Easterling Lumber Co. v. Pierce*, 235 U. S. 380, 59 L. ed. 279;  
*Jeffrey v. Blagg*, 235 U. S. 571, 59 L. ed. 364;  
*Chicago etc. v. McGuire*, 219 U. S. 549, 55 L. ed. 328;  
*Chicago Ind. L. Ry. Co. v. Hacket*, 228 U. S. 559, 57 L. ed. 966;  
*Western Indemnity v. Pillsbury*, 151 Pac. (Cal.) 398.

We will briefly consider appellant's assignment of errors, transcript pp. 262-269.

## ASSIGNMENT I.

It is plain that the complaint conforms to the Employers' Liability Law, and that the contention that it does not state facts sufficient to constitute a cause of action is without merit. There appears no record of such ruling.

## ASSIGNMENT II.

This assignment is without merit, and of which there appears no record.

## ASSIGNMENT III.

This assignment of error is likewise without merit, and of which there appears no record.

## ASSIGNMENT IV.

It does not appear from the printed record that there was any direct ruling of the court on plaintiff in error's special demurrer No. 6. Even if there had been such ruling it was correct because the doctrine of assumption of risk, by virtue of the provisions of Sec. 7 of Article 18 of the Constitution of Arizona and of the Employers' Liability Law, has been entirely removed, and the employer is rendered liable for an injury caused by an accident due to a condition of such occupation



in a hazardous employment named in the Arizona statute.

*Stertz v. Industrial Ins. Co.*, 158 Pac. (Wash.) 260, pamphlet;

*Western Indemnity v. Pillsbury*, 151 Pac. (Cal.) 398.

#### ASSIGNMENT V.

There does not appear to be any direct ruling of the court on plaintiff in error's demurrer No. 9, which in a very general way claims that Sec. 7, Art. 18, Constitution of Arizona and the Arizona Employers' Liability Act, are in violation of fourteenth amendment of United States Constitution. This contention is fully answered under Point III, *supra*, of this brief, and under authorities cited *supra*, and also the following:

*Chicago, Rock Island & Pac. Ry. Co. v. Zernecke*, 183 U. S. 582;

*State v. Clausen*, 65 Wash. 156, 117 Pac. 1101;

*Western Indemnity v. Pillsbury*, 151 Pac. 398.

Because the Employers' Liability Act places no restrictions on the amount of damages recoverable is no valid objection, the injured employee is entitled to recover the amount of damages sustained and nothing more.

*Sweet v. Chicago etc. R. Co.*, 157 Wis. 400, 147 N. W. 1054;

*Devine v. Chicago etc., R. Co.*, 266 Ill. 248, 107 N. E. 595.

## ASSIGNED ERROR VI.

We find no record where the court ruled on plaintiff in error's special demurrer No. 10.

Sec. 5 of Article 18 of Constitution of Arizona has no application to the Employers' Liability Act, but pertains to common law actions for negligence.

*Consolidated Arizona Smelting Co. v. Ujack*, 139 Pac. (Ariz.) 465.

The further statement that the Employers' Liability Act does not conform to Sec. 7 of Art. 18 of Arizona Constitution is frivolous.

The question of contributory negligence is not in this case, because the Arizona law makes the defendant liable without fault. The language of the Arizona Statute, Sec. 3154—

“any employer shall be liable for the death or injury, caused by any accident due to a condition or conditions of such occupation, of any employee in the service of such employer in such hazardous occupation, in all cases in which such death or injury of such employee shall not have been caused by the negligence of the employee killed or injured.”

The question for the jury under the instructions of the court (Transcript p. 212) was whether or not the defendant in error was guilty of negligence, and if he was, did his negligence cause his injury; if it did, he cannot recover. If plain-

tiff below was not guilty of negligence he was entitled to recover whether or not defendant was guilty of negligence, and that question was fully presented to the jury in the court's charge. Under the Arizona law the only question that the court could instruct the jury on was whether or not the plaintiff's injuries were caused by his own negligence and not on the negligence of the defendant because the defendant is liable for an accident due to a condition of such occupation, in such hazardous occupation, without fault. Under the law and the instructions of the court the burden was on the plaintiff below to prove that his injuries were not caused by his own negligence, and the court so instructed the jury.

Under this statute the question of the defendant's negligence is entirely removed, and also the doctrine of comparative negligence is taken out of the statute by virtue of the provisions of Sec. 7 of Art. 18, Arizona Constitution. Under this statute what could be the use of giving a charge on contributory negligence when the defendant is liable without fault, and the only question is, was the plaintiff below guilty of negligence?

“Contributory negligence on the part of plaintiff necessarily assumes negligence on the part of defendant.”

29 Cyc. 506, citing cases in note 44, and  
*Hammer v. Railroad Co.*, 128 Ky. 486, 108  
 S. W. 885;

*Lime Co. v. Affleck*, 115 Va. 643, 79 S. E. 1054;

*Ariz. East. R. Co. v. Bryan*, 157 Pac. 380, first column.

#### ASSIGNED ERROR VII.

The court was correct in sustaining the motion to strike, because the plaintiff in error could not prove that defendant in error was negligent at other times.

*Ariz. & N. M. Ry. Co. v. Clark*, 207 Fed. 820.

#### ASSIGNED ERRORS VIII, IX.

The assignments under VIII and IX are frivolous, and are fully answered by what has been said under V and VI, *supra*.

#### ASSIGNED ERRORS X, XI AND XII.

The errors assigned under X, XI and XII are too general, without merit and are frivolous.

#### ASSIGNED ERROR XIII.

This assignment is without merit, it was immaterial as to the habits and customs of that witness in stopping the car. The question was, what took place at the time plaintiff below was injured

and not as to habits and customs on other days and times.

29 Cyc. 619;  
 \* *Missouri, K. & T. Ry. Co. v. Johnson*, 48  
 S. W. 568.

ASSIGNED ERRORS XIV, XV, XVI, XVII.

The assigned errors XIV, XV, XVI and XVII are devoid of any merit and are frivolous.

ASSIGNED ERRORS XVIII, XIX, XX, XXI.

The errors assigned under 18, 19, 20 and 21 present the question of contributory negligence which has already been shown not to be in this case. What has been said under assigned error VI, *supra*, is a complete answer to these assignments.

ASSIGNED ERROR XXII.

The court was correct in refusing to give the instruction because the statute does not divide negligence up into degrees, or comparative negligence, or contributory negligence, but Sec. 3154 does provide that the employer shall be liable "*in all cases in which such death or injury of such employee shall not have been caused by the negligence of the employee killed or injured.*" This phase of the law was fully covered by the charge of the court, in which the jury was told that if

the injuries were caused by the negligence of the plaintiff that he could not recover, and the burden of proving that he did not receive his injuries by his own negligence was on him, and if he failed to so prove that the verdict must be for the defendant. See transcript, p. 212, where this charge was given.

ASSIGNED ERROR XXIII.

This assigned error does not present any question for this court. The remarks of the attorney were within the evidence, and were harmless, and the assignment is really frivolous.

ASSIGNED ERROR XXIV.

There is no merit in this assignment. The evidence was more than sufficient to support the verdict and judgment, and the jury was fully instructed as to the law.

ASSIGNED ERRORS XXV, XXVI, XXVII.

These assignments are entirely without merit and present no question for the consideration of this court.

ASSIGNED ERROR XXVIII.

The court did not err in denying the motion for new trial. The affidavits filed in support of

the motion for new trial were merely cumulative and contradictory of the evidence taken on the trial.

*Lowry v. Mt. Adams & Eden Park etc.*,  
68 Fed. 827.

Since, therefore, it appears that no constitutional question is presented and that no plain error is disclosed by the record, and that the character of the case is such as not to require or to be entitled to receive from the court more than a summary inspection and examination of the record, and that such examination and inspection, even if extended to the most searching scrutiny, would inevitably result in a dismissal or affirmance of the judgment below, we respectfully submit that the cause should be dismissed or the judgment of the lower court should be affirmed.

Should these motions be denied, we respectfully submit that this cause is of such a character as not to justify extended argument and that it should be transferred for hearing to the summary docket. Since it clearly appears that this writ is prosecuted only for delay, to the prejudice of the defendant in error, and is in reality frivolous, we respectfully submit that damages should be awarded to defendant in error pursuant to Rule 23 of this court, and that 12 per cent interest be added to the judgment from the time of filing of the complaint herein, November 3, 1915, as pro-



vided for by Sec. 3161, Revised Statutes of Arizona, 1913.

Respectfully submitted,

FRANK H. HEREFORD AND

~~FRANK E. CURLEY,~~

Tucson, Arizona,

*Attorneys for Defendant in Error.*

8  
Office Supreme Court,  
**FILED**  
OCT 9 1916  
JAMES D. MAHER  
CLERK

# Supreme Court of the United States.

OCTOBER TERM, 1916.

No. 476

20

THE ARIZONA COPPER COMPANY, LIMITED,  
*Plaintiff in Error,*

*v.*

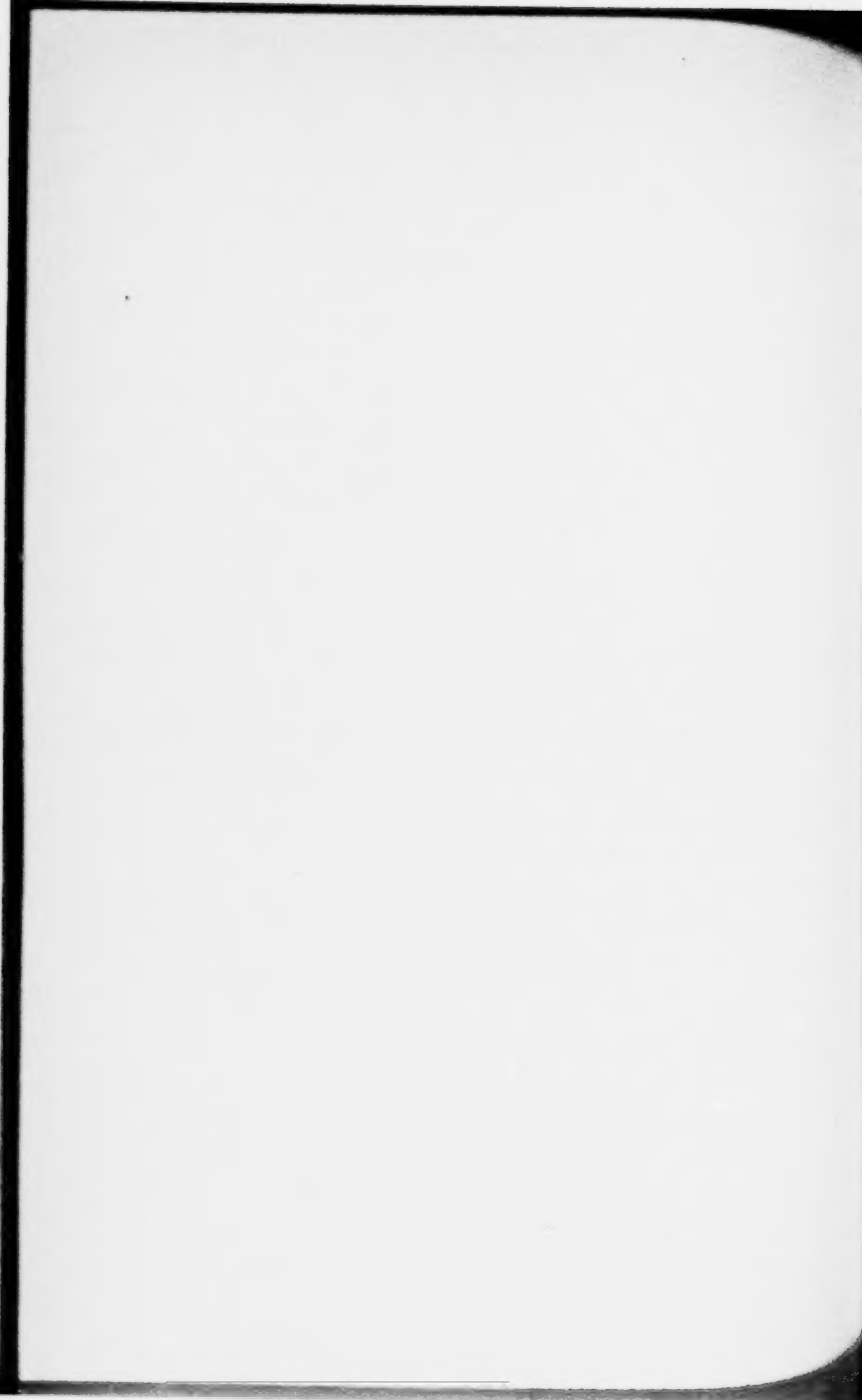
JOSEPH B. HAMMER,  
*Defendant in Error.*

---

**BRIEF FOR PLAINTIFF IN ERROR,**  
on motion to dismiss and affirm.

---

JOHN A. GARVER,  
W. C. MCFARLAND,  
*Counsel for Plaintiff in Error.*



IN THE  
Supreme Court of the United States,

OCTOBER TERM, 1916.

No. 477.

THE ARIZONA COPPER COMPANY,  
LIMITED,

*Plaintiff in error,*

VS.

JOSEPH B. HAMMER,

*Defendant in error.*

Brief for plaintiff in  
error, on motion to  
dismiss and affirm.

Motion by defendant in error to dismiss and affirm, under  
Rule 6.

**Statement.**

The action was brought by the defendant in error in the United States District Court for the District of Arizona, to recover damages for personal injuries alleged to have been sustained by him while in the employment of the plaintiff in error. A verdict was rendered in his favor for \$12,000.

## **P O I N T S .**

### **FIRST.**

#### **Questions discussed in the Bray case.**

The action was brought under the Employers' Liability Act of Arizona, and the two principal questions involved are the same as those which were raised in the Bray case (No. 478), and which are discussed in the brief submitted on a similar motion, made at the same time, in the Bray case. It will, therefore, be unnecessary to repeat the argument in this case, the Court being respectfully referred to the brief in that case.

### **SECOND.**

#### **The constitutional question duly raised in the lower Court.**

It is asserted in the brief in this case for the plaintiff in error (p. 15), that "there does not appear to be any direct ruling of the Court" on the constitutional question raised by the demurrer of the plaintiff in error.

The question was duly raised by demurrer to the complaint (Record, p. 8). The demurrer was overruled, and an exception was duly taken to the ruling (Record, pp. 16, 27).

### **THIRD.**

#### **The motion should be denied.**

Washington, October 9, 1916.

JOHN A. GARVER,  
W. C. McFARLAND,  
Counsel for plaintiff in error.

**In the Supreme Court  
of the United States**

OCTOBER TERM, 1917

**The Arizona Copper Company,  
Limited,**

Plaintiff in error,

vs.

**Joseph B. Hammer,**

Defendant in error.

No. 161

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**In Error to the District Court of the United  
States For the District of Arizona**

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**BRIEF OF DEFENDANT IN ERROR**

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**L. KEARNEY,**  
Clifton, Arizona,

**FRANK E. CURLEY,**  
Tucson, Arizona

**Attorneys for Defendant in Error.**

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IN THE  
Supreme Court of the United States

OCTOBER TERM, 1917

The Arizona Copper Company,  
Limited,

Plaintiff in error,

vs.

Joseph B. Hammer,

Defendant in error.

No. 161

---

**Brief of Defendant in Error**

This action was commenced in the United States District Court for the District of Arizona, at Tucson, under Chapter Six, Title Fourteen, Revised Statutes of Arizona, 1913, known as the "Employers' Liability Law," to recover for injuries received by defendant in error while in the employ of plaintiff in error in the operation of its smelter.

Upon the trial of the case in the District Court at Tucson, before a jury, a verdict was returned in favor of defendant in error for the sum of \$12,000.00 upon which judgment was entered and from which this appeal was prosecuted.

The question primarily presented upon this writ of error involves the constitutionality of the Arizona Employers' Liability Law. It is contended that the law under which this action was prosecuted, namely, the Arizona Employers' Liability Law, is invalid for the reasons:

1st. That it is violative of the Constitution of Arizona.

2nd. That it is violative of the Fourteenth Amendment of the Constitution of the United States in that it deprives plaintiff in error of its property without due process of law and denies it the equal protection of the laws of the State of Arizona by subjecting it to the unlimited liability for damages for personal injuries sustained by its employees without fault on the part of the employer.

### **State Constitution Considered**

The validity of this act was, since the prosecution of the writ of error in this case, sustained by the Supreme Court of Arizona in the cases of *Superior & Pittsburg Copper Co. vs. Tomich*, 19 Ariz., 165 Pac. 1101, and *Inspiration Copper Company vs. Mendez*, 19 Ariz.———, 166 Pac. 278, finally determining that question so far as this court is concerned.

## Federal Constitution Considered

This court has, we believe, in the Workmen's Compensation cases (New York Central Railroad Co. vs. White, 243 U. S. 188, 37 Sup. Ct. 247, 61 L. ed 667; Hawkins vs. Bleakly, 243 U. S. 210, 37 Sup. Ct. 255, 61 L. ed. 678, and Mountain Timber Company vs. Washington, 243 U. S. 219, 37 Sup. Ct. 260, 61 L. ed. 685) decided March 6, 1917, determined every theory advanced in opposition to the law, in favor of its validity.

That "no person has a vested interest in any rule of law entitling him to insist that it shall remain unchanged for his benefit," many times announced by this court, was reiterated in these cases, as was the further fact that the "fellow servant" doctrine, the "contributory negligence rule" and law relating to the employee's "assumption of risks" are but such common law rules in which a person has no property, no vested interest, and that it is within the power of the legislature to change or entirely repeal them.

It may well be doubted, as observed by this court in the case of New York Central Railroad Co. vs. White (*supra*) whether in view of vast industrial organization, investment and employment, "the State could abolish all rights of action on the one hand, or all defenses on the other, without setting up something adequate in their stead." No such question is presented in this case.

The Arizona Employers' Liability Law differs in one material respect from the acts under consideration in the Workmen's Compensation cases. The New York, Iowa and Washington Compensation Acts each comprehend a general scheme of adjusting liabilities be-

tween employer and employee for injuries received from almost every conceivable source, other than farm and domestic employments, from which injury is, in the ordinary course of events, expected to occur. The Arizona Employers' Liability Act does not embrace and was not calculated to embrace any such general plan.

The Arizona Law does not attempt to change the common law rules affecting injuries received in the ordinary course of employment. It was only calculated to extend relief to, and ~~provide~~ provide a remedy for, injuries received in hazards recognized in every-day life, and classified by the legislature in its proper discretion as "inherent in such occupations;" that character of extra-hazardous employment in which it is recognized that the utmost care and precaution cannot wholly avoid injury.

That this was the purpose of the legislature is not left to conjecture. By Paragraph 3155, Revised Statutes of Arizona, 1913, being Section 3 of the Employers' Liability Law, it is provided that,

"By reason of the nature and conditions of and the means used and provided for doing work in, said occupations, such service is especially dangerous and hazardous to the workmen therein, because of risks and hazards which are inherent in such occupations and **which are unavoidable by the workmen therein.** (The italic is ours.)

And, then, in the following paragraph (3156), are the hazards comprehended by the Employers Liability Act are set out as follows:

"The occupations hereby declared and determined to be hazardous within the

meaning of this chapter are as follows:

(1) The operation of steam railroads, electrical railroads, street railroads, by locomotives, engines, trains, motors, or cars of any kind propelled by steam, electricity, cable or other mechanical power, including the construction, use or repair of machinery, plants, tracks, switches, bridges, roadbeds, upon, over and by which such railway business is operated.

(2) All work when making, using or necessitating dangerous proximity to gunpowder, blasting powder, dynamite, compressed air, or any other explosive.

(3) The erection or demolition of any bridge, building or structure in which there is, or in which the plans and specifications require, iron or steel frame work.

(4) The operation of all elevators, elevating machines or derricks or hoisting apparatus used within or on the outside of any bridge, building or other structure for conveying materials in connection with the erection or demolition of such bridge, building or structure.

(5) All work on ladders or scaffolds of any kind elevated twenty feet or more above the ground or floor beneath in the erection, construction, repair, painting or alteration of any building, bridge, structure or other work in which the same are used.

(6) All work of construction, operation, alteration or repair where wires, cables, switchboards, or other apparatus or machinery are in use charged with electrical current.

(7) All work in the construction, alteration or repair of pole lines for telegraph, telephone or other purposes.

(8) All work in or about quarries, open pits, open cuts, mines, ore reduction works and smelters.

(9) All work in the construction and repair of tunnels, subways and viaducts.

10) All work in mills, shops, works, yards, plants and factories where steam, electricity, or any other mechanical power is used to operate machinery and appliances in and about such premises."

In addition to this, the Legislature, in Paragraph 3147 of Chapter IV of Title 14, Civil Code of Arizona, of 1913, made the further finding that:

"Employment in all underground mines, underground workings, open cut workings, open pit workings, in or about, and in connection with, the operation of smelters, reduction works, stamp mills, concentrating mills, chlorination processes, cyanide processes, cement works, rolling mills, rod mills, and at coke ovens and blast furnaces, is hereby declared to be injurious to health and dangerous to life and limb."

"All reasonable presumptions are in favor of its (the law's) validity, and the burden of the proof and argument is upon those who seek to overthrow it." *Erie R. Co. vs. Williams* 223 U. S. 685, 699, 58 L. ed. 1155, 1160, 51 L. R. A. (N. S.) 1097, 34 Sup. Ct. Rep. 761. (*Mountain Timber Co. vs. Washington*, *supra*, and in this respect the court is not concerned in the matter of expediency or question of policy.

In sustaining as valid a state statute limiting the hours of labor in mines, the court, in *Holden vs. Hardy*, 169, U. S. 366, 18 Sup. Ct. 383, 42 L. ed. 780, said:



"We have no disposition to criticise the many authorities which hold that state statutes restricting the hours of labor are unconstitutional. Indeed, we are not called upon to express an opinion upon this subject. It is sufficient to say of them that they have no application to cases where the legislature had adjudged that a limitation is necessary for the preservation of the health of employees, and there are reasonable grounds for believing that such determination is supported by the facts. **The question in each case is whether the legislature has adopted the statute in exercise of a reasonable discretion, or whether its action be a mere exercise for an unjust discrimination, or the oppression, or spoilation of a particular case.** The distinction between these two different classes of enactments cannot be better stated than by a comparison of the views of this court found in the opinion in *Barbier vs. Connolly*, 113 U. S. 27, and *Soon Hing vs. Crawley*, 113 U. S. 703, with those later expressed in *Yick Wo vs. Hopkins*, 118 U. S. 356." (The italic is ours.)

*Northwestern Laundry vs. Des Moines*, 239 U. S. 486, 60 L. ed. 396.

"The rule, briefly stated, is that whenever an act of the legislature is challenged in court the inquiry is limited to the question of power, and does not extend to the matter of expediency, the motives of the legislators or the reasons which were spread before them to induce the passage of the act. This principle rests upon the independence of the legislature as one of the co-ordinate departments of the govern-

ment." *Angle vs. Chicago, St. Paul, Etc., Railway*, 151 U. S. 1.

Neither will the court substitute its judgment in lieu of that of the legislature in determining the correctness or propriety of classifications. Whether or not the employments classified by the legislature as extra-hazardous, in the Employers' Liability Law, would have been the same classification made by the court, or whether this was the best that could have been done, is not for the court to say. The legislature, in the exercise of its power, and discretion, has made a **finding of fact** that in certain designated employments, injury to employees is sure to result, growing out of the very nature of the employment and irrespective of care, and it not appearing that this classification made by the legislature was either arbitrary or made in bad faith, its judgment will not be disturbed.

*Dow vs. Beidelman*, 125 U. S. 680, 31 L. ed. 841.

In the case of *Chicago, B. & Q. R. Co. vs. McGuire*, 219 U. S. 569-570, 55 L. ed. 339, on the question of police power, the court said:

"Where there is reasonable relation to an object within the governmental authority, the exercise of the legislative discretion is not subject to judicial review. The scope of judicial inquiry in deciding the question of power is not to be confused with the scope of legislative considerations in dealing with the matter of policy. Whether the enactment is wise or unwise, whether it is based on sound economic theory, whether it is the best means to achieve the desired result, whether, in short, the legislative discretion within its prescribed limits should

be exercised in a particular manner, are matters for the judgment of the legislature, and the earnest conflict of serious opinion does not suffice to bring them within the range of judicial cognizance.

"The legislature, being familiar with local conditions, is( primarily, the judge of the necessity of such enactments. The mere fact that a court may differ with the legislature in its views of public policy, or that judges may hold views inconsistent with the propriety of the legislation in question, affords no ground for judicial interference, unless the act in question is unmistakably and palpably in excess of legislative power. If there existed a condition of affairs concerning which the legislature of the state, exercising its conceded right to enact laws for the protection of the health, safety, or welfare of the people, might pass the law, it must be sustained.

"In dealing with the relation of employer and employed, the legislature has necessarily a wide field of discretion in order that there may be suitable protection of health and safety, and that peace and good order may be promoted through regulations designed to insure wholesome conditions of work and freedom from oppression."

The police power extends to the protection of the lives and health of the citizens, which is a matter of public concern. It is closely connected with the safety of employees, and undoubtedly belongs to that class of subjects over which the legislature possesses a regulatory power.

Texas & N. O. R. Co. vs. Miller, 221 U. S. 415, 55 L. ed. 795.

In case of *Missouri Pac. R. Co. vs. Mackey*, 127 U. S. 205, 32 L. ed. 107, in regard to the employers' liability law of Kansas, Justice Field said:

"The hardship or injustice of the law of Kansas of 1874, if there be any, must be relieved by legislative enactment. The only question for our examination, as the law of 1874 is presented to us in this case, whether it is in conflict with the clause of the 14th Amendment. The supposed hardship and injustice in imputing liability to the company, where no personal wrong or negligence is chargeable to it or to its directors. But the same hardship and injustice, if there be any, exists when the company, without any wrong or negligence on its part, is charged for injuries to passengers.

"The utmost care on its part will not relieve it from liability, if the passenger injured be himself free from contributory negligence."

Such laws are simply a question of legislative discretion.

*Minn. & St. Louis R. Co. vs. Beckwith*,  
129 U. S. 29.

In the case of *State vs. Schlenker*, 112 Iowa, 642, the court said:

"Courts have no authority to interfere on the ground that the acts in question violate natural principles of right and justice. Ordinarily the legislature determines when the public welfare and safety demand its exercise; and, as a general rule, courts have nothing to do with the policy, wisdom, or necessity of the enactment."

"This court has never hesitated to declare that limitations upon state power in the Federal Constitution were not designed to interfere with the exercise of the state police power."

Barbier vs. Connolly, 113 U. S. 31;

Jones vs. Brim, 165 U. S. 180;

Cunnius vs. Reading School Dist. 198 U. S. 469.

"Consequently the test whether due process of law has been violated is that of reasonableness, as distinguished from arbitrary action; but this must not be understood to authorize the court to substitute its judgment for that of the legislature as to the necessity or propriety of the legislation."

Noble State Bank vs. Haskell, 219 U. S. 104;

Hurtado vs. People of California, 110 U. S. 530, 28 L. ed. 237; Patterson vs. The Eudora, 190 U. S. 169.

"Discrimination is not invalid if it is not so arbitrary as to be beyond the wide discretion that a legislature may exercise. It may rest on narrow distinction. Whether it makes for public welfare is a matter of legislative judgment, and the courts cannot set aside a law except upon the ground of want of power."

German Alliance Ins. Co. vs. Lewis, 233 U. S. 389, 58 L. ed. 1011.

"The Federal Supreme Court is not a place of refuge from oppressive and unequal legislation, as the hardship, impolicy, or injustice of state laws is not necessarily

a constitutional objection. With the folly or wisdom of a law the 14th Amendment has no concern."

Billings vs. Illinois, 188 U. S. 97, 102, 47 L. ed. 403;

Clark vs. Kansas City, 176 U. S. 114;

Mobile County vs. Kimball, 102 U. S. 691.

"This court has many times affirmed the general proposition that it is not the purpose of the 14th Amendment in the equal protection clause to take from the states the right and power to classify the subject of legislation. It is only when such attempted classification is arbitrary and unreasonable that the court can declare it beyond the legislative authority.

"That a law may work hardship and inequality is not enough. Many valid laws, from the generality of their application, necessarily do that, and the legislature must be allowed a wide field of choice in determining the subject matter of its laws, and what shall be excluded."

Jeffrey Mfg. Co. vs. Blag, 235 U. S. 577, 59 L. ed. 369.

In an appeal taken in case of Easterling Lbr. Co. vs. Pierce, 235 U. S. 382, 59 L. ed. 281, the court said:

"An objection founded on U. S. Const., 14th Amend. to the classification provided by Miss. Laws, 1908, chap. 194, abrogating the fellow servant rule as to employees of a railroad corporation, is clearly without merit and will not serve as a basis of a writ of error, and case was dismissed for want of jurisdiction."

The Indiana employers' liability law, which embraces many features of the Arizona law, has been held valid by this court.

Chicago, I. L. R. Co. vs. Hackett, 228 U. S. 562, 57 L. ed. 967.

In the case of German Alliance Ins. Co. vs. Lewis, 233 U. S. 414, 58 L. ed. 1022, the court said:

"The subject of judicial inquiry in deciding the question of **power** is not to be confused with the scope of legislative considerations in dealing with the matter of **policy**. Whether the enactment is wise or unwise, whether it is based on sound economic theory, whether it is the best means to achieve the desired result, whether, in short, the legislative discretion within its prescribed limits should be exercised in a particular manner, are matters for the judgment of the legislature, and the earnest conflict of serious opinion does not suffice to bring them within the range of judicial cognizance."

"Every statute is presumed to be constitutional. The courts ought not to declare one to be unconstitutional, unless it is clearly so. If there is doubt, the expressed will of the legislature should be sustained."

Munn vs. Illinois, 94 U. S. 126, 24 L. ed. 83.

"That the law may seem unreasonable, oppressive, or absurd, or that there may be objections to its policy or expediency, is not sufficient to justify its judicial repeal. These are matters for which the legislature mustly shortly answer to its constituents

who can correct them. It must be in direct conflict with some expressed prohibition of the Constitution."

New York vs. Miln, 36 U. S. 11 Pet. 138,  
9 L. ed. 662;

Cooley's Constitutional Limitations (6th ed.) 192, 197, and pp. 200-203.

Rio Grande Lumber Co. vs. Darke, 167 Pac. (Utah) 242, (pamphlet.)

It is said, in the well considered case of Rio Grande Lumber Co. vs. Darke, 167 Pac. (Utah) 242-243 (October 1, 1917, Advance Pamphlet) by Thurman, J.:

"One of the fundamental rules to be applied in determining a question of this kind is that a court will not declare a statute unconstitutional and void solely on the ground of unjust and oppressive provisions, or because it is supposed to violate the natural, social, or political rights of the citizen, unless it can be shown that such injustice is prohibited or such rights are guaranteed or protected by the Constitution.

"The legislative and judicial are co-ordinate departments of the government, of equal dignity; each is alike supreme in the exercise of its proper functions; and cannot, directly or indirectly, while acting within the limits of its authority, be subjected to the control or supervision of the other, without an unwarrantable assumption by that other of power which, by the constitution, is not conferred upon it.

"The task is therefore a delicate one, and only to be entered upon with reluctance and



hesitation. It is a solemn act in any case to declare that a body of men to whom the people have committed the sovereign function of making the laws for the commonwealth have deliberately disregarded the limitations imposed upon this delegated authority, and usurped power which the people have been careful to withhold.

"It must be evident to anyone that the power to declare a legislative enactment void is one which the judge, conscious of the fallability of the human judgment, will shrink from exercising in any case where he can conscientiously and with due regard to duty and official oath decline the responsibility."

Cooley's Constitutional Limitations (6th ed.) 192, 197, 200-203, and pp. 216, 217.

9 Ency. U. S. Supreme Court Reports, pp. 521, 523, 524, 529.

Legislature takes notice that employer and employee are not upon equal footing. 9 Ency. U. S. Sup. Ct. Repts. 529,

On due process of law, see 5 Ency. U. S. Supreme Ct. Repts. 533, n. 86.

This court usually follows the decision of the lower court, when no clear and palpable error is shown.

Seaboard Air Line R. vs. Lorick, 243 U. S. 572, 61 L. ed. 907.

After citing many authorities, Mr. Taylor, in his recent work on Due Process of Law, (Par. 182) concludes:

"From the foregoing cases it clearly ap-

pears that as reasonableness is primarily a subject for the determination of the legislature, the courts will not set the legislative judgment as to reasonableness aside and substitute its own in its stead, except when it is manifest that the law in which the legislature has embodied its will is arbitrary or enacted in bad faith."

Wilmington Mining Co. vs. Fulton, 205 U. S. 60, 70, 51 L. ed. 708.

Chicago Dock and Canal Co. vs. Fraley, 228, U. S. 680, 57 L. ed. 1022.

In the case of German Alliance Ins. Co. vs. Lewis, 233 U. S. 414, 34 Sup. Ct. 612, 58 L. ed. 1022, the court said:

"The subject of judicial inquiry in deciding the question of **power** is not to be confused with the scope of legislative considerations in dealing with the matter of **policy**.

"Whether the enactment is wise or unwise, whether it is based on sound economic theory, whether it is the best means to achieve the desired result, whether, in short, the legislative discretion within its prescribed limits should be exercised in a particular manner, are matters for the judgment of the legislature, and the earnest conflict of serious opinion does not suffice to bring them within the range of judicial cognizance. (The italic is ours.)

This court in the case of Louisville & N. R. Co. vs. Melton, 218 U. S. 52-57, 30 Sup. Ct. 36, 54 L. ed. 929, in a personal injury case under the Ky. statute, said:

"That the 14th Amendment was not intended to and does not strip the states of the power to exert their lawful police authority is settled, and requires no reference to authorities.

"And it is equally settled—as we shall hereafter take occasion to show—as the essential result of the elementary doctrine that the equal protection of the law clause does not restrain the normal exercise of governmental power, but only abuse in the exertion of such authority, therefore that clause is not offended against simply because, as the result of the exercise of the power to classify, some inequality may be occasioned. That is to say, as the power to classify is not taken away by the operation of the law clause, a wide scope of legislative discretion may be exerted in classifying without conflicting with the constitutional prohibition.

"There is, therefore, no precise application of the rule of reasonableness of classification, and the rule of equality permits many practical inequalities. And necessarily so. In a classification for governmental purposes there cannot be an exact exclusion or inclusion of persons and things."

"The legislature of a state has necessarily a wide range of discretion in distinguishing, selecting and classifying, and it was declared that it was sufficient to satisfy the demand of the constitution if a classification was practical, and not palpably arbitrary.

"The whole case is put on the proviso, and the argument to that is merely one of the many attempts to impart an overmath-

emational nicety to the prohibitions of the 14th Amendment."

That "a state, in the exercise of its power to pass such legislation as reasonably is deemed to be necessary to promote the health, safety and general welfare of its people, may regulate the carrying on of industrial occupations that frequently and inevitably produce personal injuries and disability, with consequent loss of earning power, among the men and women employed, and, occasionally, loss of life of those who have wives and children or other relatives dependent upon them for support, and may require that these human losses shall be charged against the industry, either directly, as is done in the case of the act sustained in *New York C. R. Co. vs. White* 243 U. S. 188 ante 247, 37 Sup. Ct. Rep. 247, or by publicly administering the compensation and distributing the cost among the industries affected by means of a reasonable system of occupation taxes," is no longer an open question. (*Mountain Timber Co. vs. Washington*, 243 U. S. 219) and, likewise, that this (personal injuries and disability with consequent loss of earning power) is a loss arising out of the business, and however it may be charged up, is an expense of the operation, as truly as the cost of repairing broken machinery or any other expense that ordinarily is paid by the employer."

*New York C. R. Co. vs. White*, 243 U. S. 188, 37 Sup. Ct. 247, 61 L. ed. 667.

And as suggested by this court in the same case, **"Who is to bear the charge?"**

There have always been two schools of thought concerning the relations existing be-

tween masters and workmen, One may be called the property view and the other the humane view.

Under the common law, the burden of industrial accident, where no fault was attributed to employer or workman, fell on the workman. Under this law in the hazardous occupations enumerated, it falls, primarily at least, on the employer and, as well said by the Supreme Court of California in the case of *Western Indemnity Co. vs. Pillsbury*, 170 Cal. 686, 151 Pac. 398, 402; "It cannot be said that the one rule or the other is a necessary or logical result of fundamental principles of justice" but "the very trend of legislation exemplified by the act before us illustrates how general is the belief that an enlightened conception of justice requires that the old rule be superseded by the new. There is nothing contrary to the permanent and underlying notions of human right in the declaration that he who is conducting an enterprise, in the operation of which injury to others is likely to occur, shall respond for such injury to those who have not, by their own wilful misconduct, brought it upon themselves."

And as said by this court in the Washington case:

"We are clearly of the opinion that a state, in the exercise of its power to pass such legislation as reasonably is deemed to be necessary to promote the health, safety, and general welfare of its people, may regulate the carrying on of industrial occupations that frequently and inevitably produce personal injuries and disability, with consequent loss of earning power, among the men and women employed, and, occasionally, loss of life of those who have wives

and children or other relatives dependent upon them for support, and may require that these human losses shall be charged against the industry."

"The act in effect puts these hazardous occupations in the category of dangerous agencies, and requires that the losses shall be reckoned as a part of the cost of the industry, just like the pay roll, the repair account, or any other item of cost." (*Mountain Timber Co. vs. Washington, supra.*)

This was the purpose and effect of the act under consideration. As said by the Supreme Court of Arizona, in *Inspiration Consolidated Copper Company vs. Mendez*, 19 Ariz. 166 Pac. 278, 282:

"Thereby the statute declares the occupations enumerated as inherently hazardous and dangerous to workmen engaged therein, and declares that which is evident to every observant person, that the risks and hazards incident to such occupations are unavoidable by the workmen engaged therein. Such occupations designated as hazardous and dangerous, and inherently unsafe, are deemed for that reason injurious to the health and dangerous to life and limb of the workmen engaged therein, and clearly fall within the police powers of the state for regulation and control."

That such regulation is within the police power of the State is no longer an open question and "if any industry involves so great a human wastage as to leave no fair profit beyond" a reasonable compensation for the loss of life and limb, then "the State is at liberty in the interest of the safety and welfare of its people to prohibit such an industry altogether

er." (Mountain Timber Co. vs. Washington.)

While "it is evident that the consequences of a disabling or fatal injury are precisely the same to the parties immediately affected, and to the community, whether the approximate cause be culpable or innocent" (New York C. R. Co. vs. White) and under the Acts considered by this Court in the "workmen's compensation cases" (New York, Iowa and Washington) nothing short of a wilful intention to bring about the injury on the part of the employee or an injury resulting solely from intoxication of the person injured, will defeat compensation to the injured employee. In this respect, the Arizona law again differs from the New York, Iowa and Washington laws.

Under the Arizona law, if an injury received by an employee is **caused** by his **negligence**, he cannot recover. Not wilful negligence; not gross negligence; not contributory negligence, but **any** negligence causing the death or injury.

The most valuable defense possible to retain in safeguarding the interests of the employer is to say to him that neither you nor your business shall in any manner be responsible for injury to an employee due in any manner to negligence of the employee.

In other words, after having made the finding of fact that injury in these extra-hazardous employments are bound to follow from the very nature of the employment, the legislature in the exercise of the greatest degree of fairness to the employer says to the employee, "you may go thus far but no farther, and if you receive injury and it is caused by your own negligence then it is not received as a necessary result of the extra-hazardous occupation and you cannot recover."

The Arizona Employers' Liability Law was enacted by the Legislature pursuant to a constitutional mandate (Sec. 7, Article XVIII of the Arizona Constitution) providing that:

"To protect the safety of employees in all hazardous occupations, in mining, smelting, manufacturing, railroad or street railway transportation, or any other industry the Legislature shall enact an Employers' Liability Law, by the terms of which any employer, whether individual, association or corporation, shall be liable for the death or injury, caused by any accident due to a condition or conditions of such occupation, of any employee in the service of such employer in such hazardous occupation, in all cases in which such death or injury of such employee shall not have been caused by the negligence of the employee killed or injured."

The purpose of the Legislature in carrying out this mandate is expressed in Par. 3153 of the Act:

"This chapter is and shall be declared to be an employers' liability law as prescribed in section 7 of Article XVIII of the state constitution."

Then by Par. 3154 it is provided:

"That to protect the safety of employees in all hazardous occupations in mining, smelting, manufacturing, railroad, or street railway transportation, or any other industry, as provided in said section 7 of article XVIII of the state constitution, any employer, whether individual, association or corporation, shall be liable for the death or injury, caused by any accident due to a condition or conditions of such occupation, of



any employee in the service of such employer in such hazardous occupation, in all cases in which such death or injury of such employee shall not have been caused by the negligence of the employee killed or injured."

The cutting off of liability under the Arizona Act where the injury is due to negligence of an employee and in extending it to all injuries other than cases of wilful intention to bring about the injury and injuries resulting from intoxication under the acts revived in the "Workmen's Compensation Cases" are each logical when the nature and purposes of the acts are considered.

In fastening upon the particular hazardous business from which, as the legislature found as a fact, injury "because of risks and hazards which are inherent in such occupations" were "unavoidable by the workmen therein," as an operating expense, liability for injuries "caused by any accident due to a condition or conditions of such occupation" it was an expression of the utmost fairness to the employer, and the carrying out of the very purpose of the act in providing that no liability should attach if the injury was the result of negligence on the part of the employee injured or killed. While negligence (unless of a character as to show a wilful intention to bring about the injury) was abolished as a defense by the New York, Iowa and Washington Acts, it was retained as a defense under the Arizona Act. And as contributory negligence presupposes the existence of negligence on the part of the employer, and as negligence on the part of the employer does not enter into consideration in determining liability under the Arizona Act, the result is that the only common law

defenses abolished by the Arizona Act are the fellow servant doctrine and rule relating to the employees' "assumption of risks."

The object of the police power, says this court in *Barbier vs. Connolly*, 113 U. S. 31, Sup. Ct. 357, 28 L. ed. 923, is "to prescribe regulations to promote the health, peace, morals, education and good order of the people, and to legislate so as to increase the industries of the state, develop its resources and add **to its wealth and prosperity.** (*Italic is ours.*)

The exercise of the police power in a proper case justifies the destruction of property, the abatement of whatever may be regarded as a public nuisance and as said by this court in the *White* case: "liability without fault is not a novelty in the law. The common-law liability of the carrier, of the innkeeper, or him who employed fire or other dangerous agency or harbored a mischievous animal, was not dependent altogether upon questions of fault or negligence. Statutes imposing liability without fault have been sustained. *St. Louis & S. F. R. Co. vs. Mathews*, 165 U. S. 1, 22, 41 L. ed. 611, 619, 17 Sup. Ct. Rep. 243; *Chicago R. I. & P. R. Co. vs. Zerneck*, 183 U. S. 582, 586, 46 L. ed. 339, 340, 22 Sup. Ct. Rep. 229."

In the case of *St. Louis & S. F. Co. vs. Mathews* (*supra*) the court said:

"The right of the citizen not to have his property burned without compensation is no less to be regarded than the right of the corporation to set it on fire. To require the utmost care and diligence of the railroad corporations in taking precautions against the escape of fire from their engines might not afford sufficient protection to the owners of property in the neighborhood of

railroads. When both parties are equally faultless, the legislature may properly consider it just that the duty of insuring private property against loss and injury caused by the use of dangerous instruments should rest upon the railroad company, which employs the instruments and creates the peril for its own profit, rather than upon the owner of the property, who has no control over or interest in these instruments. (*Italic is ours.*)

In determining the constitutionality of a law enacted pursuant to its police power by a state, the court may not consider hardships or even injustice liable to be worked by the law as heretofore pointed out. The only issue before the court for consideration is one of power, not policy, and it is universally conceded that the limitations of this power are circumscribed only by the requirements of public safety, health, peace, morals, education, good order and prosperity of the people.

"It (police power) is universally conceded to include everything essential to the public safety, health, and morals, and to justify the destruction or abatement, by summary proceedings, of whatever may be regarded as a public nuisance. Under this power it has been held that the state may order the destruction of a house falling to decay or otherwise endangering the lives of passersby; the demolition of such as are in the path of a conflagration; the slaughter of diseased cattle; the destruction of decayed or unwholesome food; the prohibition of wooden buildings in cities; the regulation of railways and other means of public conveyance, and of interments in burial grounds; the restriction of objectionable trades to certain localities; the compulsory vaccination of children; the confinement of

the insane or those afflicted with contagious diseases; the restraint of vagrants, beggars, and habitual drunkards; the suppression of obscene publications and houses of ill fame; and the prohibition of gambling houses and places where intoxicating liquors are sold. **Beyond this, however, the state may interfere wherever the public interests demand it, and in this particular a large discretion is necessarily vested in the legislature to determine not only what the interests of the public require, but what measures are necessary for the protection of such interests.** (*Italic is ours*)

Lawton vs. Steele, 152 U. S. 133, 14 Sup. Ct. 499, 38 L. ed. 385.

### REASONABLE COMPENSATION

Adopting as a text such expressions as "Viewing the entire matter, it cannot be pronounced arbitrary and unreasonable for the state to impose upon the employer the absolute duty of making a **moderate and definite** compensation in money to every disabled employee, or, in case of his death, to those entitled to look to him for support, in lieu of the common-law liability confined to cases of negligence," (New York C. R. Co. vs. White) it is contended by plaintiff in error that the act under consideration violates the Fourteenth Amendment to the United States Constitution for the reason that it subjects the employer to **unlimited liability without fault.**

At the outset it must certainly be conceded by defendant in error that the compensation allowed must be reasonable, and it must certainly be conceded by plaintiff in error that what is "reasonable compensation" is ultimately a question for the courts to determine.

"The question of the reasonableness of a rate of charge for transportation by a railroad company involving as it does the element of reasonableness both as regards the company and as regards the public, is eminently a question for judicial investigation, requiring due process of law for its determination. If the company is deprived of the power of charging reasonable rates for the use of its property, and such deprivation takes place **in the absence of an investigation by judicial machinery**, it is deprived of the lawful use of its property, and thus, in substance and effect of the property itself, without due process of law, and in violation of the Constitution of the United States." (Italic is ours.)

Chicago M. & St. P. R. Co. vs. Minnesota  
134 U. S. 418, 33 L. ed. 970.

While this was a rate case, it does not differ in principle from the case under consideration.

A sale of compensation may, in the solution of a general plan of adjustment, be provided by the legislature, as was done in the acts under consideration in the "Workmen's Compensation Cases." But, if so fixed, the compensation provided must in each case be reasonable, and whether or not it is reasonable is a judicial and not a legislative question. Or, upon the other hand, the legislature may, as the Arizona statute did, provide for a reasonable compensation and leave the amount of such compensation to be fixed by a court of competent jurisdiction in the ordinary course of law. And, surely, at this late day, it will not be urged that the plan of fixing the amount of injury sustained by an in-

jured employee, by "investigation by judicial machinery" is not due process of law.

The law (Par. 3154) provides that, in case of death or injury under the conditions set forth, the employer "shall be liable for the death or injury" sustained by the employee. The employer is not subjected to punishment for negligence or otherwise, but is required to pay as compensation the amount of injury sustained and this amount is to be determined by "investigation by judicial machinery."

Under the Arizona law, as under the Federal Safety Appliance Act, the employer is required to pay such amount as will compensate for the injury sustained, and nothing more, and that amount must be proven by the well established rules of evidence.

Sweet vs. Chicago & R. Co. 157 Wis. 400,  
147 N. W. 1054.

Devine vs. Chicago & R. Co. 266 Ill. 248,  
107 N. E. 595.

Compensation, to be reasonable, must be reasonable to both employer and employee. If, upon the one hand, the employer is required to pay more than will justly compensate the injured employee for the injury received, then it is unreasonable as to the employer, and if, upon the other hand, the employee is required to accept less than will justly compensate him for the injury received, then it is unreasonable as to him.

It could not add either to the effect or validity of a nact for the legislature to impress a limitation of \$10,000 or \$50,000 as the maximum value of a life or \$5000 or any other sum as the maximum value of an eye, an arm or a leg.

Upon the reasonableness of such limitation being questioned it would again become the duty of the court to determine whether or not the limitations prescribed were such as to deprive either party of due process of law or the equal protection of the laws.

In any event, the question to be ultimately determined by the court in each case is whether a verdict rendered in fixing the value of an injury is or is not sustained by the evidence and which was passed upon by the lower court in this case.

We do not know of any law that will give exact justice in all cases. The verdict of two juries on the same facts is seldom the same. There cannot be a just scale of compensation in all cases. Where a statute fixes as a standard what is termed a reasonable amount, according to a definite scale, as compensation for an injury, oftentimes the greatest injustice is done in operating under such system. Under many of these systems the compensation is so small that the injured employee is not benefited by receiving the award fixed by the statute.

Whether the legislature could have passed a better law, or that its present law is faulty, or whether the systems adopted by some of the states more nearly conform to the views of the court are not questions upon review. The legislature necessarily is clothed with a wide field of discretion in law-making. When the Arizona Act was passed the legislature was acting within its police power and whether that law is wise or unwise, or whether or not a different law in the opinion of the court should have been enacted, and whether or not the legislature in its discretion should have substituted its judgment to that of a jury in



determining the value of injuries, are all questions for future legislatures to deal with.

### INTEREST ON JUDGMENT

Paragraph 3161, chap. tit. 14, Civil Code of Arizona, 1913, is as follows:

3161. "In all actions for damages brought under the provisions of this chapter, if the plaintiff be successful in obtaining judgment, and if the defendant appeals to a higher court, and if the plaintiff in the lower court be again successful; and the judgment of the lower court be sustained by the higher court or courts; then, and in that event, the plaintiff shall have added to the amount of such judgment by such higher court or courts, interest at the rate of twelve per cent per annum on the amount of such judgment from the date of the filing of the suit in the first instance until the full amount of such judgment is paid."

The supreme court of Arizona, case of *Mendez*, 166 Pac. 278, has held this statute valid. The interest clause of this statute has not been assigned as error on appeal, and, for all we know, no claim will be made that it is unconstitutional. Had this question been properly raised in the lower court, then this court would determine whether or not it does offend against the Constitution of the U. S.

The interest clause, which is a matter of costs, falls alike upon all classes under the statute.

The Arizona legislature, for the government of procedure under this statute in the courts, and for the protection of those who have obtained judgments in the trial courts against frivolous appeals, and to compensate



them, to some extent, for expenses necessary in attending to their interests when appeals have been prosecuted without just cause, has enacted this statute. The statute does not at all affect the ground of recovery or the measure of recovery; it deals with a question of costs.

Missouri, K. & T. R. Co. vs. Harris, 234 U. S. 412, 58 L. ed. 1377.

"Whether interest shall accrue upon a judgment is a matter not of contract between the parties, but of legislative discretion, which is free, so far as the Constitution of the United States is concerned, to provide for interest as a penalty or liquidated damages for the non-payment of the judgment, or not to do so. When such provision is made by statute, the owner of the judgment is of course entitled to the interest so prescribed.

Morley vs. Lake Shore & Mich. So. R. Co. 146 U. S. 162, 36 L. ed. 929, first column.

"Interest is allowed by way of damages for failure to pay money when it is due, and frequently is not allowed except from the time the amount to be paid has been definitely ascertained. But there are many cases in which interest is charged from a prior date."

Consal vs. Cummings, 222 U. S. 262, 56 L. ed. 197, bottom of second column.

"The equal protection of the laws is not denied to life insurance companies, by Tex. stat. imposing penalty for failure to pay loss, after demand therefor, an additional of 12 per cent damages and reasonable at-

torneys' fees, although such obligation is not imposed upon other classes of insurance companies."

Fidelity Mutl. Ass. vs. Mettler, 185 U. S. 308, 46 L. ed. 932, 2nd column.

"Double liability and attorneys' fees may be exacted under Ark. laws from a railway company refusing to pay for killing of live stock by one of its trains within 30 days after the owner's demand, without denying the railway company the due process of law guaranteed by U. S. Const., 14th Amend., though litigants in general are not subject to the same burdens."

Kansas City So. R. Co. vs. Anderson, 233 U. S. 325, 58 L. ed. 983.

Mo. K. & T. R. Co. vs. Cade, 233 U. S. 642, 58 L. ed. 1135.

Under the Interstate Commerce Commission law, a reasonable attorneys' fee may be taxed by the court against a carrier.

Meeker vs. Lehigh Valley R. Co. 236 U. S. 412, 59 L. ed. 644.

This court has held the Neb. statute which imposes an attorneys' fee in a suit against a fire insurance company a valid exercise of its power to classify, and free from constitutional objection, and reaffirming the doctrine of Fidelity Mut. Life Asso. vs. Meetler, 185 U. S. 308, 46 L. ed. 922, where the statute of Texas was sustained, alone to life insurance policies, which authorized the enforcement, not only of a reasonable attorneys' fees, but also 12 per cent damages after demand in case of the unsuccessful defense of a suit to enforce a life insurance policy.

Farmers' & M. Ins. Co. vs. Dobney, 189  
U. S. 301, 47 L. ed. 821.

The reason for imposing a penalty of 12 per cent as costs, under the Arizona statute, in case of affirmance on appeal, is tersely stated in the opinion of Lancashire Ins. Co. vs. Bush, 60 Neb. 116, 82 N. W. 313, as follows:

"The reason is not far to seek. It is a matter of common knowledge that corporations engaged in the business of insuring real estate have long been accustomed to vexatiously and oppressively resist payment of claims arising under their policies. The reports of this court bear abundant evidence to the fact that no other class of litigants has so persistently endeavored to escape liability from their contract obligations by imposing technical and unconscionable defenses to actions instituted against them.

The law in question was designed to repress an evil practice and to advance public interests and promote justice. It was an exercise of legislative power justified by considerations of public policy."

What is said in the Bush case, *supra*, is equally true as to corporations when sued to recover damages for personal injury to their employees; they have long been accustomed to vexatiously and oppressively resisting the payments of judgments rendered against them of which fact the reports of this court bear abundant evidence.

We will briefly consider plaintiff in error's assigned errors. (Transcript of Record, pp. 262-269.

Assignments I, II and III are clearly without merit

#### **Assignment IV.**

Under this assignment complaint is made of the overruling of plaintiff in error's special demurrer No. 6, by which it was alleged that the injury was caused wholly by and resulted from the **usual** and **ordinary** risks of the employment.

In construing the Arizona Law relative to assumed risks, the Supreme Court of Arizona in the case of Inspiration Consolidated Copper Co. vs. Mendez (*supra*) said:

"The statute clearly does not require as a condition of liability that the accident causing the injury proximately resulted from the master's negligence, and it as clearly does exclude as a matter of defense the assumption of all ordinary and extraordinary risks inherent in the occupation. Such risks and dangers as are inherent in the occupation are declared to be unavoidable risks and dangers, and therefore it necessarily follows that the employee in entering upon his duties does not assume such ordinary inherent risks, although known to him. Such risks as he may assume must be risks and dangers other than risks and dangers inherent in the occupation.

#### **Assignment V.**

The constitutionality of the Arizona Employers' Liability Act raised by this assignment has been covered in our opening argument.

#### **Assignment VI.**

The validity of the law under the Arizona constitution raised by this assignment has

been determined in favor of the act by the Supreme Court of Arizona in the cases of Inspiration Consolidated Copper Co. vs. Mendez (supra) and Superior & Pittsburg Copper Co. vs. Tomich (supra.)

### **Assignment VII.**

The striking from plaintiff in error's answer that portion complained of under this assignment was proper for several reasons:

First: It does not excuse plaintiff in error for the injury or charge negligence on the part of defendant in error.

Second: The fact that defendant in error was upon other occasions and at other times interrupted by the calcine car is no evidence that he was so interrupted at the time of the injury.

Third: The fact that he was warned at other times is no evidence or even argument that he was so warned at the time of the injury.

Fourth: If it could be contended that the allegation was one of negligence, then it was merely cumulative as the answer contained the direct allegation of negligence, that defendant in error was warned of the approach of the car and negligently and deliberately refused to remove himself from the hopper and received such injury by reason thereof. (Transcript of record, pages 13-14.)

It could not be shown that either party to this cause was careful or negligent at other times.

Ariz. & N. M. Ry. Co. vs. Clark, 207 Fed.  
820.

### **Assignment VIII.**

This assignment also presents the common law doctrine of assumption of risk, which did not arise in this action. This was fully discussed under Assignment IV.

### **Assignment IX.**

This assignment presents the question of liability without fault, which has been argued at length in the opening portion of our brief.

### **Assignment X.**

The matter of permitting defendant in error to amend his pleading was within the discretion of the trial court.

### **Assignments XI and XII**

These assignments of error do not point out the evidence complained of; do not conform to Sec. 1, Rule 35, of the rules of this Court, and must be disregarded.

### **Assignment XIII.**

It was not only immaterial what the habits and customs of witness were in stopping the car at other times, (29 Cyc. 619. Missouri K. & T. Ry. Co. vs. Johnson, 92 Tex. 380, 48 S. W. 568) but this assignment also does not conform to Sec. 1, Rule 35, of the rules of this court and must be disregarded.

### **Assignments XIV, XV, XVI and XVII.**

These assignments, and each of them, are not only devoid of merit, but likewise fail to comply with Sec. 1, Rule 35, of the rules of this court and must be disregarded.

### **Assignments XVIII, XIX, XX and XXI**

These instructions were all requested by

plaintiff in error upon the theory of the common law rule of contributory negligence in bar of the cause of action.

Plaintiff in error did not plead or offer to plead contributory negligence in reduction of its liability to defendant in error, but its whole theory was, and this theory was followed out in the requested instructions that contributory negligence on the part of defendant in error would bar an action under the Employers' Liability Law.

As heretofore pointed out, this act was upheld and construed by the Supreme Court of Arizona in the cases of *Superior & Pittsburg Copper Co. vs. Tomich*, 19 Ariz.———165 Pac. 1101, and *Inspiration Consolidated Copper Co. vs. Mendez*, 19 Ariz.———, 166 Pac. 278. In the *Tomich* case the court in passing upon this identical question said:

"The defendant set forth in its answer the contributory negligence of the plaintiff, consisting of the manner in which the plaintiff was performing his duties at the time of the accident, but defendant's answer does not set forth any claim for a reduction of damages by reason of such negligence, but claims such contributory negligence as a complete, not a partial, defense to the action. The answer is evidently interposed upon the theory of the common-law rule of contributory negligence in bar of the cause of action. Under the provisions of Chapter 6, *supra*, nothing less than the sole negligence of the employee injured will bar an action based on the statute for damages. Negligence of the employee contributing to the injury may serve to reduce the amount of the recovery, but will not bar recovery.

"The defendant, having in its answer admitted that its negligence in part was the cause of the damages, by setting forth a charge of contributory negligence against the plaintiff, authorized a verdict against defendant in any event. The matters left open for inquiry were the amount of the damages the plaintiff was entitled to recover as measured by the allegations of the complaint and the evidence, and whether the accident was due to a condition or conditions of the employment and such as is unavoidable."

The instructions complained of having been offered, therefore, upon the common-law theory of absolute defense against liability were under the construction placed upon this act by the Supreme Court of Arizona properly rejected.

#### **Assignment XXII.**

Due to the fact that the court instructed the jury (Transcript of record, page 211), "if such injuries were caused by the negligence of the plaintiff himself, then he cannot recover in this action and your verdict must be for the defendant," the instruction complained of under this assignment could be but cumulative to say the least, and was properly refused.

#### **Assignment XXIII.**

This assignment would be without merit even if the objection had been properly preserved.

The remarks complained of were not only invited by previous argument on the part of counsel for plaintiff in error, but were wholly immaterial as it was not necessary for the jury



to find that there was negligence on the part of plaintiff in error and the court so instructed. Furthermore, the transcript of testimony does not show the time or circumstances under which an objection was made to the remarks; does not show a request to the court to withdraw the remarks or to admonish the jury, and does not show an exception.

#### **Assignment XXIV**

The questions presented in this assignment are also without merit. Similar questions were presented to and passed upon by the Supreme Court of Arizona in the Superior and Pittsburg Copper Co. and Inspiration Consolidated Copper Co. cases (supra).

**Assignment XXV** does not present any question for the consideration of this court.

**Assignments XXVI and XXVII** are wholly without merit.

#### **Assignment XXVIII.**

The court did not err in denying the motion for new trial. The affidavits filed in support of the motion for new trial were merely cumulative and contradictory of the evidence taken on the trial and did not justify the granting of a new trial.

Lowry vs. Mt. Adams & Eden Park etc.,  
68 Fed. 827.

Southard vs. Russell, 16 How. 547, 569,  
14 L. ed. 1062.

#### **INTEREST ON JUDGMENT**

Paragraph 3161 Civil Code of Arizona 1913, provides that if the judgment of the

lower court be sustained by the higher court, then there shall be added by the higher court interest at the rate of 12 per cent. per annum on the amount of such judgment from the date of filing of the complaint in the lower court, which in this case was March 30, 1915. We request that such interest be added in case this judgment is affirmed.

Respectfully submitted,

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JAMES D. MAHER,  
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# Supreme Court of the United States,

OCTOBER TERM, 1917.

20&21

Nos. ~~10000~~

THE ARIZONA COPPER COMPANY, LIMITED,  
*Plaintiff in Error,*  
*vs.*

JOSEPH B. HAMMER,  
*Defendant in Error.*

THE ARIZONA COPPER COMPANY, LIMITED,  
*Plaintiff in Error,*  
*vs.*

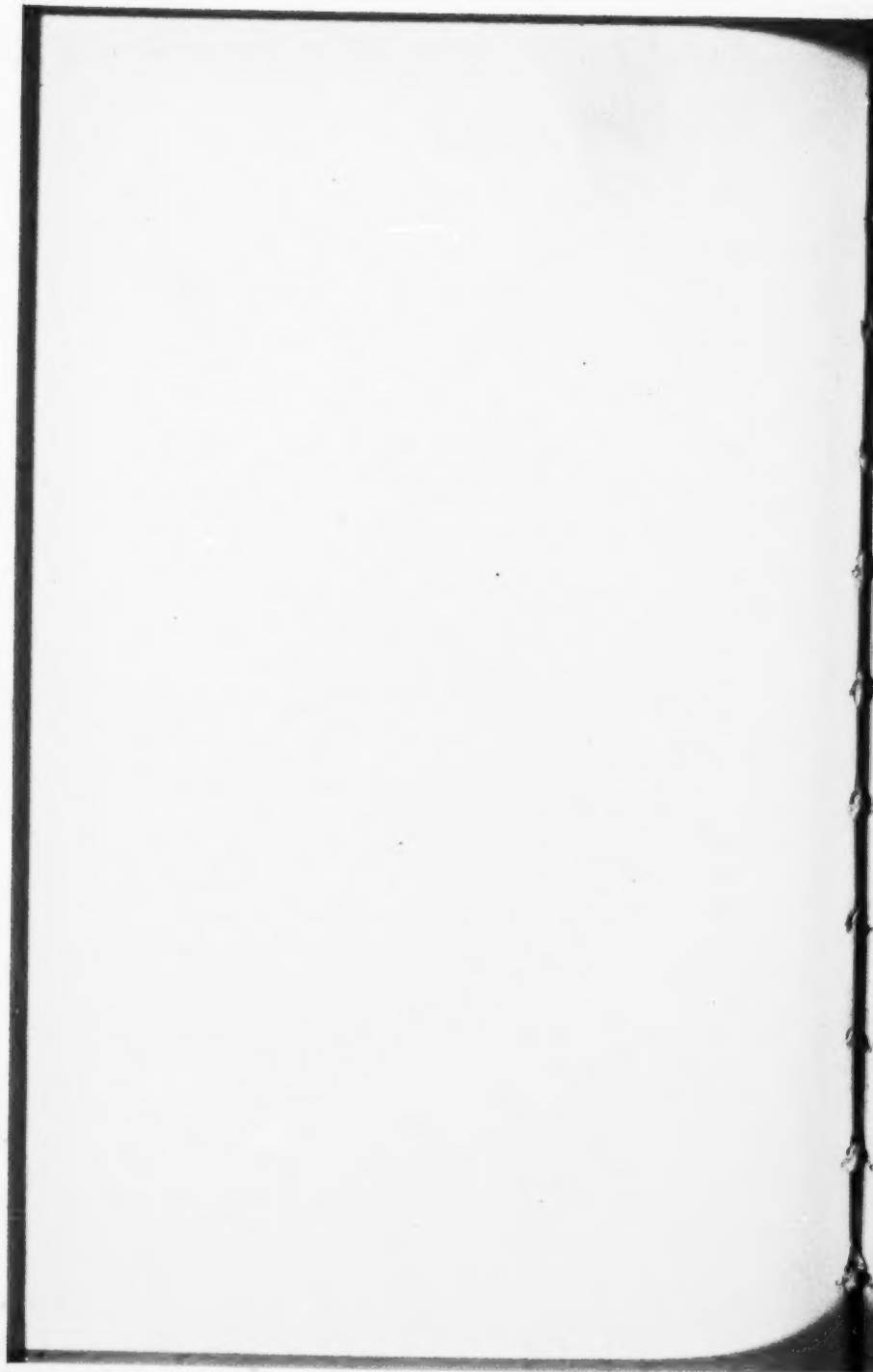
RICHARD BRAY,  
*Defendant in Error.*

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## BRIEF FOR PLAINTIFF IN ERROR.

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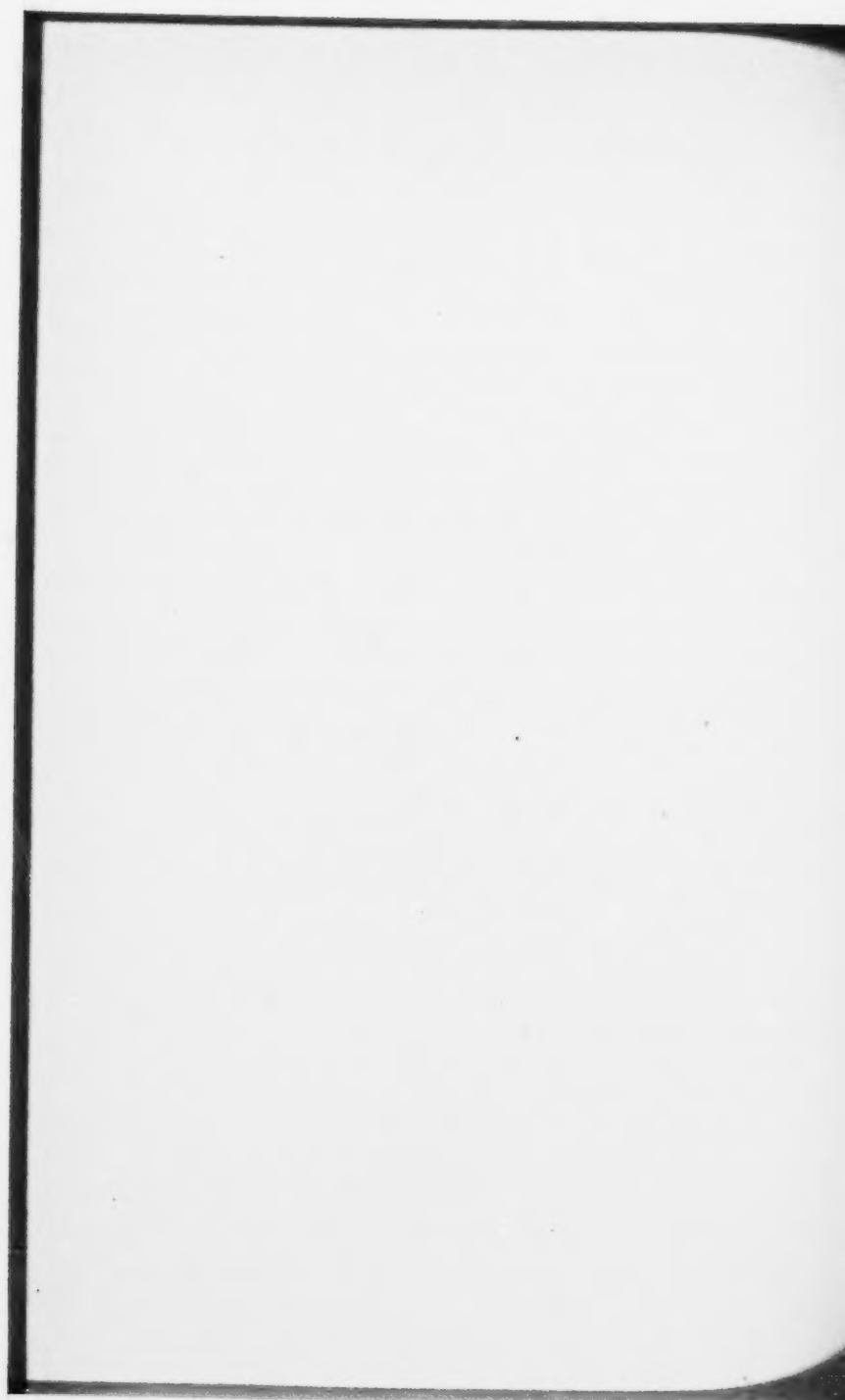
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**Supreme Court of the United States,**

OCTOBER TERM, 1917.

NOS. 161 AND 162.

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THE ARIZONA COPPER COMPANY,  
LIMITED,  
*Plaintiff in error,*

VS.

JOSEPH B. HAMMER,  
*Defendant in error.*

---

Brief for  
Plaintiff in Error.

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THE ARIZONA COPPER COMPANY,  
LIMITED,  
*Plaintiff in error,*

VS.

RICHARD BRAY,  
*Defendant in error.*

---

These cases come before the Court by writs of error to the United States District Court for the District of Arizona, under Section 238 of the Judicial Code.

**Statement.**

The action brought by Joseph B. Hammer was to recover \$50,000 damages for personal injuries sustained while making repairs and improvements on a hopper, on the feed floor of the defendant's smelter, a large quantity of hot calcine having

been discharged upon him from a loaded car operated above the hopper. A verdict was rendered in his favor for \$12,000.

The action brought by Richard Bray was to recover \$50,000 damages for personal injuries alleged to have been sustained by him while working in the defendant's mine. The injuries were caused by rock and earth falling upon him from the roof of the tunnel in which he was engaged. A verdict was rendered in his favor for \$9,000.

Both actions were brought under the Employers' Liability Law of Arizona (Ch. 6, of Title 14, Rev. Stat., 1913), which declares that, in certain hazardous occupations, including mining and smelting, employers shall be liable in damages, *to an unlimited extent*, for injuries sustained by their employees resulting from accidents due to conditions of the occupation, where the injury is not caused by the negligence of the injured employee. This unlimited liability is imposed irrespective of any negligence or fault on the part of the employer and even though he may be desirous of complying with the Workmen's Compensation Law.

In the Hammer case, the question of the validity of the Employers' Liability Law was raised by demurrer to the complaint (Record, p. 8), which was overruled, and an exception duly taken (Record, pp. 16, 27).

In the Bray case, the constitutional question was duly raised by demurrer (Record, pp. 5, 10) and by motions made to dismiss the complaint (Record, pp. 12, 110).

### **Assignments of Error.**

The Employers' Liability Law of Arizona violates the Fourteenth Amendment of the Federal Constitution, in that it deprives the plaintiff in error of its property without due process of law and denies it the equal protection of the law.



## P O I N T S .

### FIRST.

#### The Arizona Constitution and legislation.

There is in Arizona a Workmen's Compensation Law as well as an Employers' Liability Law, but the former is not compulsory upon the workman. A person injured in Arizona, while engaged in a hazardous occupation, has his choice of three remedies :

1. He may claim compensation under the Workmen's Compensation Law ;
2. He may sue under the Employers' Liability Law ;
3. He may bring the ordinary common law action.

I. While the Workmen's Compensation Law is compulsory upon the employer, it is not compulsory upon the workman. He may elect, even after the accident, to pursue one of the other remedies open to him.

Consolidated Arizona Smelting Co. v. Ujack, 15  
Ariz., 382.

II. Under the Employers' Liability Law, the employer is made liable *to an unlimited extent, even without fault*, provided the injury was not occasioned wholly by the negligence of the person injured.

III. Both under the Employers' Liability Law and at common law, the employer is deprived of all his common law defenses, even though he is willing to pay the compensation provided by the Workmen's Compensation Law. The assumption of risk and contributory negligence are made questions of fact for the jury ; and if there has been contributory negligence in an action under the Employers' Liability Law, the plaintiff may still recover, although the damages are to be diminished in proportion to his negligence.

IV. The pertinent provisions of the Constitution and statutes are set forth in Appendix A, hereto annexed.

## SECOND.

### Unique features of the Arizona legislation.

I. Arizona is the only State that has made its Workmen's Compensation Law a nullity, by not making it compulsory upon the workman when its terms have been accepted by the employer and by permitting the workman, where the injury was not occasioned wholly by his own fault, to sue under a law which imposes an entirely new and unlimited liability without fault and practically deprives the employer of every defense known to the common law, thus making the trial a mere assessment of damages.

This is all the more serious in Arizona in view of the constitutional provision (Art. II., Sec. 31), forbidding any limitation in the amount of damages recoverable for causing the death or injury of any person, and the further provision (Art. II., Sec. 23) empowering the legislature to provide for a verdict of nine or more jurors in civil cases; which the legislature subsequently did (Rev. Stat., 1913, Sec. 532). In a strictly mining community such as that which exists for the most part in Arizona, the jurors are necessarily drawn from the very employees whose claims will be brought before the courts under the Employers' Liability Act. The cumulative effect of all this legislation is, therefore, to favor unduly the large and controlling class of employees at the expense of the relatively small class of employers. The consequences are similar to those which this Court had in mind in *Yick Wo v. Hopkins* (118 U. S., 356), when it said (p. 374):

"Though the law itself be fair on its face and impartial in appearance, yet if it is applied and administered by public authority with an evil eye and an unequal hand so as practically to make unjust and illegal discriminations between persons in similar circumstances material to their rights, the denial of equal justice is still within the prohibition of the constitution."

II. In all other legislation of this kind, there has been a mutuality in the apportionment of the risk and an attempt to reach a scientific, or at least equitable, basis of compensation, established usually upon a definite system graduated to the estimated impairment of the earning powers of the workman, thus enabling the employer to determine with reasonable accuracy the tax or insurance that he must pay as a condition of being permitted to engage in an industry which, by its mere operation, will inevitably result in injuries to the persons employed.

III. The legislation in Arizona was obviously the result of compromise, in which, as the event proved, substantially everything was yielded to the workmen. It was apparently assumed that all employees would willingly accept the terms of the Workmen's Compensation Law, and that employers could be compelled to do so by holding over them the threat of the unlimited liability to which they would be exposed without any fault on their part, under the Employers' Liability Law. Unfortunately, the legislation did not work out in that manner, in actual practice; for the enterprising attorneys who make a specialty of such business immediately perceived the possibilities which lay in an Act imposing unlimited liability without fault, where the defendant was deprived of all defenses except the negligence of the plaintiff and where the consequences even of that negligence could easily be placed upon a relative basis, which would virtually nullify the defense of negligence.

IV. The Constitution of Arizona (Art. XVIII., Sec. 8, *post*, p. 16) required the legislature to enact a "Workmen's *Compulsory* Compensation Law"; and the first section of the Act actually passed by the legislature (Sec. 3163, *post*, p. 19) states that it is a workmen's *compulsory* compensation law.

What the members of the Constitutional Convention doubtless had in mind, and what the legislature apparently

set out to accomplish, was the enactment of a statute that would compel employers in dangerous occupations to make compensation on a reasonable basis for injuries sustained in such occupations and to compel workmen to accept such compensation. But, in enacting the law, the compulsory feature as to the workmen was entirely eliminated.

### **THIRD.**

**The principles established by this Court in such cases.**

I. This Court has given very careful consideration to various workmen's compensation Acts and employers' liability laws, those passed by the Federal Congress as well as those enacted by state legislatures. In the case of the Federal Employers' Liability Act (35 Stat. L., 65), negligence on the part of the employer must be established; and in the case of the Federal Compensation Law (35 Stat. L., 556), the liability is strictly limited to a year's wages.

II. Various phases of such legislation have been considered and the grounds on which it may be sustained have recently been enunciated by this Court, in cases arising under the laws of New York, Iowa and Washington.

New York Central R. R. Co. v. White, 243 U. S., 188 ;

Hawkins v. Bleakley, 243 U. S., 210 ;

Mountain Timber Co. v. Washington, 243 U. S., 219.

The New York and Washington statutes are compulsory upon workmen as well as employers; and, under the Iowa statute, if the workman rejects the compensation provided by the Act and brings an action at law, the employer may plead all the common law defenses.

III. In reaching the conclusion that these Workmen's Compensation Acts were a valid exercise of legislative power,

this Court was influenced by two considerations : one, involving a legal principle, that in taking away the common law defenses, or some of them, from the employer, the legislature had substituted a substantial equivalent, in limiting the liability of the employer according to a prescribed and reasonable schedule, which would probably not be any more onerous upon him than his common law liability ; and the other, involving social and economic considerations, that the legislation was a valid exercise of the police power, in promoting the general welfare.

In the White case, this Court said (243 U. S., 188, 203) :

" It is plain that, on grounds of natural justice, it is not unreasonable for the State, *while relieving the employer from responsibility for damages measured by common-law standards* and payable in cases where he or those for whose conduct he is answerable are found to be at fault, to require him to contribute *a reasonable amount*, and according to a *reasonable and definite scale*, by way of compensation for the loss of earning power incurred in the common enterprise, irrespective of the question of negligence."

And again (p. 205) :

" Viewing the entire matter, it cannot be pronounced arbitrary and unreasonable for the State to impose upon the employer the absolute duty of making *a moderate and definite* compensation in money to every disabled employee, or, in case of his death, to those who were entitled to look to him for support, *in lieu of the common-law liability* confined to cases of negligence."

And in the Washington case, the Court said (243 U. S., 219, 234) :

" While plaintiff in error is an employer, and cannot succeed without showing that its constitutional rights as employer are infringed \* \* \*, yet it is evident that *the employer's exemption from liability to private action is an essential part of the legislative scheme and the quid pro quo for the burden imposed upon him*, so that, if the act is not valid as against employees, it is not valid as against employers."

IV. The justification for legislation of this kind is that, in the interest of society, hazardous occupations should themselves be charged with the reasonable burden of sustaining the inevitable loss resulting from the inherent risks of the business, which no ordinary care or foresight can guard against, and that a liability or insurance fund should be created by a tax upon the business, which, on the one hand, will afford substantial and speedy compensation to the injured employee, and prevent his becoming an object of charity, and, on the other hand, will protect the employer from uncertain and possibly ruinous verdicts that might bankrupt the business, to the injury, not only of the particular employer and of all other workmen employed by him, but of society generally.

The fund obtained as the result of such legislation is in the nature of an insurance against the joint risk in which the parties embark. The liability of the employer is defined and regulated according to the injuries sustained, and the right of the employee to receive, without delay, the entire compensation thus fixed, is established. Both employer and workman are directly benefitted, and the State is relieved from caring for many unfortunates who might otherwise become dependent upon it.

New York Central R. R. Co. v. Winfield, 244 U. S., 147; dissenting opinion of BRANDEIS, J., pp. 165-7.

V. But legislation of this kind, as this Court pointed out, must be reasonable to the employer as well as to the employed. It promotes the general welfare only in so far as it relieves society from the ills of the existing system. One of the greatest of those ills was the heavy burden of litigation which the old system fostered, with long deferred and scant, if any, benefits to the person sustaining the injuries, with great expense both to the State and to the employer, and with an uncertain liability

thrown upon the employer, against which he could protect himself only by insurance in companies whose principal business consisted in combating all claims for injuries.

#### **FOURTH.**

##### **Arizona legislation clearly unconstitutional.**

The Arizona legislature completely failed to apply either of the principles referred to in the recent decisions of this Court.

I. The employer is deprived of his common law defenses and is given nothing in return, because the workman is left free to reject the compensation provided by the Workmen's Compensation Law.

II. The public welfare is not promoted by the legislation. It is still burdened with useless and mischievous litigation, much of it improperly promoted. Instead of quieting litigation, the Employers' Liability Law of Arizona is a direct incitement to additional litigation and even to the wilful infliction of injuries.

The statute will cause direct injury to society at large; for unlimited liability without fault will necessarily act as an effectual deterrent to the investment of capital in industries declared to be hazardous. Men of small means might be ruined by a single verdict; and large corporations would be in constant danger from excessive verdicts, as is obvious from the verdict of \$12,000 in the Hammer case, and of \$9,000 in the Bray case, \$50,000 having been asked for in each case; while in another action decided by the Supreme Court of Arizona (*Superior and Pittsburg Copper Co. v. Tomich*, 165 Pac., 1101), now before this Court, a verdict was rendered for \$8,000, in a case where the injury was confined to the first joints of three fingers.

Arizona owes its present state of development primarily and largely to the development of its mineral resources; and the employment of labor in that State is principally in the industries connected with the mining and treatment of ores, and the transportation of their product to market, all of which occupations are declared by the statute to be hazardous. It is surely not to the interest of the State and of the persons now engaged in the industries of the State to impose such ruinous conditions upon the employment of capital in the mining and transportation industries as to make their withdrawal probable and impede the investment of additional capital. That would have a disastrous effect not only upon the employers and workmen actually engaged in the hazardous occupations, but upon the entire population of the State.

III. Another peculiar feature of the Arizona Liability Law is in giving a workman, whose injury is due solely to his own negligence, the right to demand compensation under the Workmen's Compensation Law. Thus, in the only instance in which an employer could interpose a complete defense under the Liability Law, he is obliged to make compensation under the Workmen's Compensation Law.

IV. A further peculiar consequence of the Employers' Liability Law is that, if the employer pleads that the negligence of the workman contributed to the injury, he is thereby prevented from claiming that he himself was not guilty of negligence (*Superior and Pittsburg Copper Co. v. Tomich*, 165 Pac., 1101); and if the employer is actually guilty of some negligence, he gets off more lightly than if he is entirely free from fault, because, in the former case, the liability will be apportioned between the employer and employee in proportion to their negligence (See dissenting opinion of Ross, J., in *Superior and Pittsburg Copper Co. v. Tomich*, 165 Pac., 1185, 1186).

V. A further peculiar feature of the Arizona Liability Law is that there may be a recovery in the case of death, even



where there is no one in existence who was in any way dependent upon the decedent, and even though his next of kin may be enemies of the state and nation, or even though he may have no ascertainable next of kin. Workmen's compensation laws should limit the benefits to the injured person or those actually dependent upon him; and this principle has been universally recognized in this and other countries.

VI. No other State, so far as we have been able to ascertain, has ever gone to the extreme extent shown in this Arizona legislation, of subjecting employers to unlimited liability without any fault on their part, or without any compensating obligation on the part of the workmen. The Arizona Workmen's Compensation Law is a mere farce, so far as any protection to the employer is concerned; and it is resorted to by the workman only when his own conduct has effectually barred his recovery in an action at law.

### **FIFTH.**

#### **Recent decisions of the Supreme Court of Arizona sustaining the legislation.**

The Employers' Liability Law has been declared to be valid by the Supreme Court of Arizona in two cases recently decided by it, which are now before this Court.

Inspiration Consolidated Copper Co. v. Mendez,  
166 Pac., 278; 19 Ariz.,                   ; dissenting  
opinion of Ross, J., not yet published, but an-  
nexed hereto as Appendix B (*post*, p. 21);  
Superior and Pittsburg Copper Co. v. Tomich  
165 Pac., 1101; dissenting opinion of Ross, J.,  
165 Pac., 1185.

The cases were decided at the same time (July 2, 1917); but the opinion in the Mendez case was written first (165 Pac., 1101, 1103).

I. *Inspiration Copper Co. v. Mendez.*

That was an action under the Employers' Liability Law of Arizona, for injuries sustained by Mendez while working in the Company's mines. The injury was not claimed to have been the result of defendant's negligence, but to have been due to the condition of the occupation, as defined by the statute. The defendant assailed the validity of the law on the ground that it violated the Fourteenth Amendment, in that it attempted to create a liability without fault, thus depriving the defendant of its property without due process and denying it the equal protection of the law. A verdict was rendered in favor of the plaintiff for \$5,500.

In the Supreme Court of Arizona, the same argument seems to have been addressed to the Court by the appellant, as was addressed to this Court in the White and other workmen's compensation cases heretofore referred to. At any rate, the two Justices who united in the prevailing opinion assumed that the question was "identical" with that considered by this Court in the White case, and that the decision in the White case was controlling upon them. On this point, the Court said (166 Pac., 278, 283) :

"The statute under consideration in the White case is a compensation statute of the State of New York. The constitutional question involved in that case as shown by the foregoing statement of the matter is the identical question raised in this case, viz., the power of the State to create a liability against the employer for accidental injuries to employees, which occur without fault of the employer."

And after copious extracts from the opinion of this Court in the White case, the Court said (166 Pac., 284) :

"Thus, from the court of ultimate authority over questions affecting constitutional guaranties and rights, we find answers to all of the arguments advanced by the appellant why Chapter VI of Title 14 (the Employers' Liability Law) is in conflict with the Fourteenth Amendment of the Constitution of the United States."

The suggestion that the amount recoverable was not limited, was dismissed in a single paragraph (166 Pac., 284), not by any consideration of the Federal constitutional question, but by reference to a provision of the State Constitution, which provided that no law should be passed limiting the amount of damages recoverable for causing death or injury to any person.

Reference has already been made to the very able dissenting opinion of Ross, J. (Appendix B, *post*, p. 21), which has not yet been reported. Judge Ross, while fully recognizing the power of the State to legislate in such matters and to create a liability without fault under certain conditions, in the case of hazardous occupations, demonstrated that the legislation in question was very different from that involved in the compensation acts recently considered by this Court; and in the course of his opinion, he pointed out (*post*, p. 25) that by this legislation, "none of the evils of a difficult problem affecting one of the most important of social relations was done away with." He calls attention to the fact that this Court, in the White case, said that the Workmen's Compensation Law was a *substituted* system, to compensate employers or their dependents for injuries in certain hazardous occupations, with a definite method employed to determine the amount of the injury; and he then added (*post*, p. 26):

"Our liability is not a substitution for former rights and remedies. It creates a new right, not to take the place of old ones but supplemental or cumulative in its nature. It leaves open to the injured employee or his personal representatives or dependents the common law action of negligence, as modified by our Constitution, and also the right to claim under the Compensation Act."

In conclusion, he characterizes the conditions in Arizona, growing out of this legislation, as "confused, chaotic and unsatisfactory;" and he strongly urges that a rational system

of compensation, "following the laws of other states," be adopted.

## II. *Superior and Pittsburg Copper Co. v. Tomich.*

That was an action under the Employers' Liability Act of Arizona to recover damages for an injury to three fingers necessitating their amputation at the first joint. The plaintiff was employed in pushing a car in a mine and the injury resulted from his stumbling while so engaged. In the complaint, the defendant company was charged with negligence; but, upon the trial, the cause of action based upon negligence was expressly waived and abandoned. The jury returned a verdict for \$8,000, which counsel for the appellee conceded was excessive (165 Pac., 1186). The tendency to excessive verdicts in such cases was commented on by Ross, J., in his dissenting opinion (165 Pac., 1185, 1186).

The objection that the Employers' Liability Law was unconstitutional was disposed of on the authority of the Mendez case (*supra*).

In his dissenting opinion, Ross, J., called attention to the provision in the statute, that an employer wholly free from negligence is exposed to greater liability than if he contributed to the injury, because, in the latter case, the damages are apportioned (165 Pac., 1186).

III. From the foregoing, it will be seen that in neither of the Arizona decisions was the validity of the Employers' Liability Law, under the Fourteenth Amendment, discussed or considered by the two members of the Court who rendered the decision, and that they both erroneously assumed that the decision of this Court in the White case was controlling upon them.

**SIXTH.****Liability without fault.**

There are certain cases in which the courts have recognized that there may be liability without fault; but they are exceptions to the general rule of liability under our law and depend on conditions which are in no way applicable to this situation. Some of them are based on the ancient insurer's liability of innkeepers and carriers, while others relate to the strict liability which has been imposed on railroads in relation to damages caused by fire or by injuries to cattle. The latter are really not cases of liability without fault, as the liability is usually imposed only where there has been a failure to comply with some reasonable requirement, such as fencing the railroad's right of way. This is simply an instance of the power of the legislature to create a new obligation, failure to observe which is a sufficient wrong to be the basis of liability.

**SEVENTH.**

**In each case, the judgment of the Court below should be reversed, and judgment should be directed in favor of the plaintiff in error, dismissing the complaint upon the merits.**

Washington, January, 1918.

JOHN A. GARVER,  
ERNEST W. LEWIS,  
Counsel.

## Appendix A.

### I. *Constitution of Arizona.*

Article XVIII of the Arizona Constitution is entitled "Labor."  
SECTIONS 4, 5, 6, 7 and 8 of that Article are as follows :

"SEC. 4. The common law doctrine of fellow servant, so far as it affects the liability of a master for injuries to his servant resulting from the acts or omissions of any other servant or servants of the common master is forever abrogated.

"SEC. 5. The defense of contributory negligence or of assumption of risk shall, in all cases whatsoever, be questions of fact and shall, at all times, be left to the jury.

"SEC. 6. The right of action to recover damages for injuries shall never be abrogated, and the amount recovered shall not be subject to any statutory limitation.

"SEC. 7. To protect the safety of employees in all hazardous occupations, in mining, smelting, manufacturing, railroad or street railway transportation, or in any other industry the legislature shall enact an *Employers' Liability Law*, by the terms of which any employer, whether individual, association or corporation shall be liable for the death or injury, caused by any accident due to a condition or conditions of such occupation, of any employee in the service of such employer in such hazardous occupation, in all cases in which such death or injury of such employee shall not have been caused by the negligence of the employee killed or injured.

"SEC. 8. The Legislature shall enact a Workmen's Compulsory Compensation law applicable to workmen engaged in manual or mechanical labor in such employments as the legislature may determine to be especially dangerous, by which compulsory compensation shall be required to be paid to any such workman by his employer, if in the course of such employment personal injury to any such workmen from any accident arising out of, and in the course of, such employment is caused in whole or in part, or is contributed to, by a necessary risk or danger of such employment, or a necessary risk or danger inherent in the nature thereof, or by failure of such employer, or any of his or its officers, agents, or employee, or employees, to exercise due care, or to comply with any affecting such employment; Provided, that it shall be optional with said employee to settle for such compensation, or retain the right to sue said employer as provided by this Constitution."

## II. *Employers' Liability Law.*

This Law was enacted by the Legislature, at its first Special Session held in 1912, shortly after the adoption of the Constitution, and now comprises Chapter VI, of Title 14 of the Revised Statutes of Arizona, 1913, entitled "Liability of employers for injuries to workmen in dangerous occupations" (Sections 3153 to 3162, inclusive).

The relevant portions of the Act are as follows :

" SEC. 3153. This chapter is and shall be declared to be an employers' liability law, as prescribed in Section 7 of Article XVIII of the State Constitution.

" SEC. 3154. That to protect the safety of employees in all hazardous occupations in mining, smelting, manufacturing, railroad, or street railway transportation, or any other industry, as provided in said Section 7 of Article XVIII of the state constitution, any employer, whether individual, association or corporation, shall be liable for the death or injury, caused by any accident due to a condition or conditions of such occupation, of any employee in the service of such employer in such hazardous occupation, in all cases in which such death or injury of such employee shall not have been caused by the negligence of the employee killed or injured.

" SEC. 3155. The labor and services of workmen at manual and mechanical labor, in the employment of any person, firm, association, company, or corporation, in the occupations enumerated in the next section hereof, are hereby declared and determined to be service in a hazardous occupation within the meaning of the terms of the preceding section.

" By reason of the nature and conditions of, and the means used and provided for doing the work in, said occupations, such service is especially dangerous and hazardous to the workmen therein, because of risk and hazards which are inherent in such occupations and which are unavoidable by the workmen therein.

" SEC. 3156. The occupations hereby declared and determined to be hazardous within the meaning of this chapter are as follows :

" (1) The operation of steam railroads, etc.

" (8) All work in and about quarries, open pits, open cuts, mines, ore reduction works and smelters.

" (10) All work in mills, shops, works, yards, plants and factories where steam, electricity, or any other mechanical

power is used to operate machinery and appliances in and about such premises.

"SEC. 3157. Every employer, whether individual, firm, association, company or corporation, employing workmen in such occupation, of itself or through an agent, shall by rules, regulations and instructions, inform all employees in such occupations as to the duties and restrictions of their employment, to the end of protecting the safety of employees in such employment.

"SEC. 3158. When in the course of work in any of the employments or occupations enumerated in the preceding section, personal injury or death by any accident arising out of and in the course of such labor, services and employment, and due to a condition or conditions of such occupation or employment, is caused to or suffered by any workman engaged therein, in all cases in which such injury or death of such employee shall not have been caused by the negligence of the employee killed or injured, then the employer of such employee shall be liable in damages to the employee injured, or, in case death ensues, to the personal representative of the deceased for the benefit of the surviving widow or husband and children of such employee; and, if none, then to such employee's parents; and, if none, then to the next of kin dependent upon such employee, and if none, then to his personal representative, for the benefit of the estate of the deceased.

"SEC. 3159. In all actions hereafter brought against any such employer under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to any employee, or where such injuries have resulted in his death, the question whether the employee may have been guilty of contributory negligence, or has assumed the risk, shall be a question of fact and shall at all times, regardless of the state of the evidence relating thereto, be left to the jury, as provided in section 5 of article XVIII of the state constitution; provided, however, that in all actions brought against any employer, under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee.

"SEC. 3161. In all actions for damages brought under the provisions of this chapter, if the plaintiff be successful in obtaining judgment, and if the defendant appeals to a higher court, and if the plaintiff in the lower court be again successful; and the judgment of the lower court is sustained by the higher court or courts; then and in that event the



plaintiff shall have added to the amount of such judgment by such higher court or courts, interest at the rate of 12 per cent. per annum on the amount of such judgment from the date of the filing of the suit in the first instance until the full amount of such judgment is paid."

### III. *Workmen's Compensation Law.*

This Law was also adopted at the Special Session of the Legislature in 1912, and now comprises Chapter VII of Title 14 of the Revised Statutes of Arizona, 1913, entitled "Compensation for injuries to workmen engaged in dangerous and hazardous employments" (Section 3163 to 3179, inclusive).

The relevant portions of the Chapter are as follows:

"SEC. 3163. This Chapter is a Workmen's Compulsory Compensation Law, as provided in Sec. 8 of Article XVIII of the State Constitution.

"SEC. 3164. Compulsory compensation shall be paid by his employer to any workman engaged in any employment declared and determined as in the next section hereof (as provided in Sec. 8 of Article XVIII of the State Constitution) to be especially dangerous, whether said employer be a person, firm, association, company or corporation, if in the course of the employment of said employee personal injury thereto from any accident arising out of, and in the course of, such employment is caused, in whole or in part, or is contributed to, by a necessary risk or danger of such employment, or a necessary risk or danger inherent in the nature thereof, or by failure of such employer, or any of his or its officers, agents or employee or employees, to exercise due care, or to comply with any law affecting such employment.

"SEC. 3165. (This is substantially identical with Section 3156 of the Employers' Liability Law.)

"SEC. 3166. In case such employee or his personal representative shall refuse to settle for such compensation (as provided in Sec. 8 of Article XVIII of the State Constitution), and chooses to retain the right to sue said employer (as provided in any law provided for in Sec. 7, Article XVIII. of the State Constitution), he may so refuse to settle and may retain said right.

"SEC. 3167. It is hereby declared and determined to be contrary to public policy that any employer conducting any especially dangerous industry, through any of his or its officers, agents, or employee or employees, shall fail to exercise due care, or fail to comply with any law affecting such employment, in such manner as to endanger the lives and safety of employees thereof, without assuming the burden of

the financial loss through disability entailed upon such employees, or their dependents, through such failure; and it is further declared and determined to be contrary to public policy that the burden of the financial loss to employees in such dangerous employments, or to their dependents, due to injuries to such employees received through such accidents as are hereinbefore mentioned shall be borne by said employees without due compensation paid to said employees, or their dependents, by the employer conducting such employment, owing to the inability of said employees to secure employment in said employments under a free contract as to the conditions under which they will work.

"SEC. 3168. The common law doctrine of no liability without fault is hereby declared and determined to be abrogated in Arizona, as far as it shall be sought to be applied to the accidents hereinbefore mentioned.

"SEC. 3169. When, in the course of work in any of the employments described in the third section above, personal injury by accident arising out of and in the course of such labor, service, or employment, is caused to or suffered by any workman engaged therein, by any risk or failure specified in section 66 (Par. 3164) hereof, then such employer shall be liable to and must make and pay compensation to the workman injured, and his personal representative, when death ensues, for the benefit of the estate of the deceased, for such injury at the rates and in the manner hereinafter set out in this chapter;

"Provided, that the employer shall not be liable under this chapter in respect of any injury which does not disable the workman for a period of at least two weeks after the date of the accident from earning full wages at the work at which he was employed, at the time of the injury; and provided, further, that the employer shall not be liable under this chapter in case the employee refuses to settle for such compensation and retains his right to sue as provided in section 68 (Par. 3166) of this title."

The Sections following, from 3169 to 3176, prescribe the procedure for fixing the compensation.

The concluding provision of Section 3176 is as follows:

"SEC. 3176. \* \* \* If, after the accident, either the employer or the workman shall refuse to make or accept compensation under this chapter or to proceed under or rely upon the provisions hereof for relief, then the other may pursue his remedy or make his defense under other existing statutes, the State Constitution, or the common law, except as herein provided, as his rights may at the time exist. Any suit brought by the workman for a recovery shall be held as an election to pursue such remedy exclusively."

## Appendix B.

### IN THE SUPREME COURT OF THE STATE OF ARIZONA.

INSPIRATION CONSOLIDATED COPPER COMPANY, a corporation,	Appellant,
------------------------------------------------------------	------------

vs.

CEFERINO MENDEZ,	Appellee.
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No. 1508.

Ross, J. (Dissenting):

The majority opinion states the facts upon which this case is based. It is clear therefrom the appellant was guilty of no negligent act. Indeed, it is not suggested either by pleadings or otherwise that the accident was caused by any act of appellant. On the contrary the facts would seem to indicate a lack of caution or skill upon the part of appellee.

I agree with the majority opinion that the state is clothed with power to require the employer without fault to compensate his employee for injury or in case of his death, his dependents. This principle is too well settled to be now questioned. I am satisfied that the state legislature in the absence of constitutional limitations and directions as set forth in Section 7, Art. 18 of the State Constitution could have enacted a law providing for compensation to employees injured without fault of the employer, along the general lines of the various compensation acts of the different states of the Union. I think also that under the provisions of Sec. 7, Art. 18, it was possible to formulate a law giving compensation to the employee when injured without any fault of the employer. In other words, I am of the opinion that the mandate contained in

said section and article of the Constitution is not violative of any provision of the Constitution of the United States. My quarrel is with the legislation under that mandate and not the mandate itself.

Chapter VI, Title 14, Civil Code 1913, creates a liability without fault but adopts no system or scale of compensation. It leaves the liability to be ascertained by a jury, as under the common law action for tort. It injects incongruities as to defenses allowed the employer on account of the employee's negligence. These latter, I will not discuss here for whatever view is taken of them, they do not relieve the method of ascertaining the liability, of serious, and in my opinion, fatal constitutional objections.

In the first place, I will consider the nature of this so-called Employers' Liability Law. It is designated as such both by the Constitution and the Legislature. There is not much in the name; the true test of what the right of action is, or was intended to be, must in this case, as in all others, be ascertained from the words used to describe and define it.

The Constitution directs the Legislature to "enact an Employers' Liability Law, by the terms of which any employer \* \* \* shall be *liable* for the death or injury caused by any accident due to a condition or conditions of such occupation, in all cases in which such death or injury of such employee shall not have been caused by negligence of the employee killed or injured" (Sec. 7, Art. 18).

The liability enjoined and contemplated is one heretofore unknown to our laws. Manifestly it is not an employers' liability law in the sense in which those terms are generally used and understood, for the reason that liability laws are based on tort. They are in fact the common law right of action for negligence, with most of the defenses heretofore allowed abrogated or greatly modified. They do not undertake to create liability without fault, as is done by our legislation.

*Rounsville vs. Central R. Co.*, 87 N. J. L., 371; 94 Atl., 392.

*Winfield vs. N. Y. Central R. Co.*, 216 N. Y., 264; 110 N. E., 614.

Ann. Cas., 1916, A 817 Note to *Seaboard A. L. B. Co. vs. Horton*, L. R. A., 1915, C. 54.

These cases hold that a law making the employer liable without fault creates a new right of action unknown to the common law.

The legislation is a new departure creating a new liability. It is said :

" This legislation is wholly in derogation of the common law. It is legislation which awards compensation for the accidental industrial injuries to be added to the cost of production."

*Andrejowski vs. Wolverine Coal Co.*, 182 Mich., 298 ; 148 N. W., 684.

The liability contemplated by our Constitution being therefore a new liability, it was within the power and province of the legislature to fix and regulate it, with no limitation on that power except the employer be given the equal protection of the law and that the method of ascertaining his liability be in accordance with due process of law.

In every other jurisdiction in this country except ours, where this new right of action has been created, the law has been called a " compensation law " and the award to the employee, or his dependents has been called " compensation." The liability or compensation is based upon the average wages and the extent of the injury suffered by the employee. It is not an action to recover " damages " as are the common law action for negligence and the action under the employer's liability law.

For some inexplicable reason the framers of our Constitution enjoined on the legislature the duty of enacting two laws for the same general purpose ; namely, the creation of a liability of the employer without fault. See Secs. 7 and 8, Art. 18. The latter differs from the first principally in that it is called a " compensation law " and authorizes recovery whether the employee causes the injury or not. In both instances the employer is made liable without fault. In the one as well as the other, the liability of the employer is a new one.

Under the Compensation Act, Chapter VII, Title 14, Civil Code, the legislature provided a method of recompensing the employee for injury or death by an allowance based upon his ability as a wage earner and the extent of his injury—in that respect following the compensation laws of other states. The legislature designates the recompense for injury or death under the Employer's Liability Act as " damages for personal injuries " evidently intending thereby that the damages recovered should be ascertained and *measured by the common law* standard or by the rules governing in actions sound-

ing in tort. In the matter and quantum of evidence to establish liability thereunder, it is practically the same, if not identical, with the Workmen's Compensation Law. The pecuniary liability is, however, unlimited. It contemplates a trial by jury whose only functions, necessarily in most cases, must be the fixing by their verdict the sum to be paid by the employer.

To an injured employee, or in case of his death, there are now open to him or his personal representatives or dependents, three avenues of redress: First, the Workmen's Compensation Law; Second, the Employer's Liability Law; and Third, the Common Law Action for Damages, supplemented by what is commonly known as the Lord Campbell Act. I have indicated somewhat of the nature of the first two. The status of the third or action for negligence, as it exists in this state at present, is as follows:

The common law doctrine of fellow servant is abrogated. The defence of contributory negligence and assumption of risks are questions of fact to be at all times left to a jury, and the right of action to recover damages for injuries may not be abrogated, nor may the amount of recovery be limited by statute. Sections 4, 5 and 6, Art. 18, and Section 31, Art. 2, Constitution.

These provisions of the Constitution were evidently intended to apply only to actions of negligence, in which the measure of damages were to be according to the rules of the common law. Thus understood, the common law action for damages for personal injury is so modified or changed as really and in fact to constitute what is generally known as the employer's liability law.

That the above constitutional provisions do not apply to or affect the newly created rights of action for compensation against the employer is evident or else our Workmen's Compensation Act would be violative of the Constitution, in that it does limit the amount of recovery. For like reasons I think they do not apply to the liability created by the statute known as the Employer's Liability Act. This latter act creating new liability—one not known to the common law and in derogation thereof—it would seem that the power of the legislature to fix the measure of compensation in disregard of the common law rule is as absolute as under the compensation act.

"The theory upon which the compensation law is based (which is now generally accepted) is that each time an employee is killed or injured there is an economic loss which

must be made up or compensated in some way, that most accidents are attributable to the inherent risk of employment—that is no one is directly at fault—that the burden of this economic loss should be borne by the industry rather than by society as a whole, that a fund should be provided by the industry from which a *fixed sum* should be set apart as every accident occurs to compensate the person injured or his dependents, for his or their loss." (Italics mine.) *State vs. Industrial Com.*, 92 Ohio St., 434, 450; 111 N. E. 299; L. R. A., 1916, D. 944.

The justification of such an economic rule and its substitution for the common law and employer's liability rule of damages for personal injury is variously stated by the courts, but all are based upon common ground: That the State owes the duty to its members of preventing their becoming public charges by reason of injuries sustained in the industries of modern civilization, the duty to stop the waste of time and money in protracted and bitterly contested law suits and thereby remove one of the most potent causes of hatred, animosity and distrust between employer and employee, the duty to prevent unjust and bogus claims supported and opposed by perjury and subornation, and to see that *bona fide* claims for compensation are amicably and expeditiously settled, the duty of relieving the state from the expense of personal injury litigation and finally to see that the injured, or his dependents, received not a moiety but all that the employer is required to pay.

*Appeal of Hotel Bond Co.*, 89 Com., 143, 146, 93 Atl., 245; *Cunningham vs. Northwestern Imp. Co.*, 44 Mont., 180, 204, 119 Pac., 554.

*Hawkins vs. Bleakley*, 220 Fed., 378, 379; *Stertz vs. Industrial Ins. Co.*, 158 Pac., 256, 258; *Lewis vs. Industrial A. C. Co.* 2d., 156 Pac., 268.

The reasons given by the courts to sustain the compensation laws, it is apparent from what has been said, cannot be invoked in support of our so-called employer's liability law. None of the evils "of a difficult problem, affecting one of the most important of social relations" is done away with.

The majority opinion bases its judgment entirely upon the reasoning of the Supreme Court in *New York U. R. C. vs. White*, 243 U. S., 188, 61 L. Ed., , 37 Sup. Ct, 247, 13 N. C. C. A., 943, in which was considered the New York Workmen's Compensation Act. It is said in that case that the workmen's com-



pensation act was a *substituted system* devised to compensate employees or their dependents for injuries in certain hazardous businesses, the measure of damages being based upon the loss of earning power, having regard to the previous wage and the character and duration of the disability and in case of death, benefits according to the dependency of the surviving wife, husband or infant child. Our liability act is *not a substitution* for former rights and remedies. It creates a new right, not to take the place of old ones, but supplemental or cumulative in its nature. It leaves open to the injured employee or his personal representatives or dependents the common law action of negligence as modified by our Constitution, as also the right to claim under the Compensation act.

Justice PITNEY, in the *White* case, said that as between the employer and the employee, the common law defenses of the negligence of a co-employee, assumed risk and contributory negligence could be completely abolished without violating any fundamental right of the employer or the law of the land. He cites in support thereof a number of cases upholding the state and federal departures from the common law rules of liability of the employer, but he says, at page 258 :

"It is true that in the case of the statutes thus sustained there were reasons rendering the particular departures appropriate. Nor is it necessary, for the purposes of the present case, to say that a state might, without violence to the constitutional guaranty, of 'due process of law', suddenly set aside all common law rules respecting liability as between employer and employee, without providing a *reasonable substitute*. Considering the vast industrial organization of the state of New York, for instance, with hundreds of thousands of plants and millions of wage earners, each employer, on the one hand, having embarked his capital, and each employee, on the other, having taken up his particular mode of earning a livelihood, in reliance upon the probable permanence of an established body of law governing the relation, it perhaps may be doubted whether the state could abolish all rights of action, on the one hand, or all defenses, on the other, *without setting up something adequate in their stead*. No such question is here presented, and we intimate no opinion upon it." (*Italics mine.*)

There is an intimation here that even the common law defenses of negligence of a fellow servant, assumed risk and contributory



negligence may not be arbitrarily abolished without substituting in place thereof some rule or system benefiting the conditions and situation, and when it is considered, that the act we now have in hand, is not substitutional—that it does not “set aside one body of rules only to establish another system in its place,” but that it is purely and simply cumulative, affording an additional, new and heretofore unknown right of action with practically all defenses of the employer abrogated, I think it is quite the supposititious case alluded to by Justice PITNEY. This legislation has not attempted to “abolish all rights of action” but has created a new and additional right of action allowing no defense thereto except that it appear that the accident inflicting the injury was caused by the negligence of the employee. To say as the majority opinion does, that the negligence that will defeat a recovery by the employee, may be one of assumption or contribution is a violation and repudiation of the very definition of the right of action as defined. It certainly does not mean the negligence of working in a dangerous or hazardous place, or with careless, unskilled or incompetent co-employees. Neither does it mean contributory negligence, for in that case the injury would be caused by the combined negligence of the employer and employee and not “by the negligence of the employee killed or injured.” It means a negligence by the employee at the instant of the injury or death and without which there would have been no accident. It must mean some intentional or culpable act or omission. But whatever view may be taken of that, the employer is denied the right to defend by showing that the accident was through no fault of his, and an employee whose negligence caused the injury may fall back on the Workmen's Compensation Act. If it is “due to a condition or conditions of the occupation” he may sue under the Employer's Liability Act.

In the White Case it was decided that the state was competent to set aside one body of rules and to establish another system in its place. There the common law rules governing the liability of the employer to the employee were abrogated and in lieu thereof a system of compensation substituted. Of the substituted system it was said :

“ Of course, we cannot ignore the question whether the new arrangement is *arbitrary* and *unreasonable*, from the standpoint of natural justice. Respecting this, it is important to be observed that the act applies only to disabling or fatal personal injuries received in the course of hazardous employ-

ment in gainful occupation. Reduced to its elements, the situation to be dealt with is this: Employer and employee, by mutual consent, engage in a common operation intended to be advantageous to both; the employee is to contribute his personal services, and for these is to receive wages, and, ordinarily, nothing more; the employer is to furnish plant, facilities, organization, capital, credit, is to control and manage the operation, paying the wages and other expenses, disposing of the product at such prices as he can obtain, — taking all the profits, if any there be, and, of necessity, bearing the entire losses. \* \* \*

"It is plain that, on grounds of natural justice, it is not *unreasonable* for the state, while relieving the employer from responsibility for *damages measured by common-law standards* and payable in cases where he or those for whose conduct he is answerable are found to be at fault, to require him to contribute a *reasonable amount*, and according to a *reasonable and definite scale*, by way of compensation for the loss of earning power incurred in the common enterprise, irrespective of the question of negligence, instead of leaving the entire loss to rest where it may chance to fall—that is, upon the injured employee or his dependents. Nor can it be deemed *arbitrary* and *unreasonable* from the standpoint of the employee's interest, to supplant a system under which he assumed the entire risk of injury in ordinary cases, and in others had a right to recover an amount more or less speculative upon proving facts of negligence that often were difficult to prove, and *substitute a system* under which, in all ordinary cases of accidental injury, he is sure of a *definite and easily ascertained compensation*, not being obliged to assume the entire loss in any case, but in all cases assuming any loss beyond the prescribed scale. \* \* \*

"In excluding the question of fault as a cause of injury, the act in effect disregards the proximate cause and looks to one more remote,—the primary cause, as it may be deemed,—and that is, the employment itself. For this, both parties are responsible, since they voluntarily engage in it as co-adventurers, with personal injury to the employee as a probable and foreseen result. \* \* \*

"Viewing the entire matter, it cannot be pronounced *arbitrary* and *unreasonable* for the state to impose upon the employer the absolute duty of making a *moderate and definite compensation* in money to every disabled employee, or, in case of his death, those who were entitled to look to him for support, in lieu of the common-law liability confined to cases of negligence.

"This, of course, is not to say that *any scale of compensation*, however insignificant, on the one hand, or onerous, on the other, would be supportable. In this case, no criticism

is made on the ground that the compensation prescribed by the statute in question is unreasonable in amount, either in general or in the particular case. Any question of that kind may be met when it arises." (*Italics mine.*)

Our liability law does not relieve "the employer from responsibility for damages measured by common law standards." It does not "require him to contribute a reasonable amount, according to a reasonable and definite scale, by way of compensation for loss and earning power." It is not a substituted system assuring the employee "a definite and easily ascertained compensation," and he is not required to assume "any loss beyond the prescribed scale." It violates the recognized power of "the state to impose upon the employer the absolute duty of making a *moderate* and *definite compensation* in money in every disabled employee \* \* \* in lieu of the common law liability confined to cases of negligence," by permitting a recovery of an unlimited amount not for disability alone, as in the White case, but for physical suffering also. It is not a composition of losses sustained in a mutual joint adventure (as Justice PITNEY reasons) in which accidental injury is inevitable and is expected, but it places all of the loss without limitation upon one of the "co-adventurers." There is in it no conception of having the employer and employee share in some measure or at all, the loss incidental to personal injuries, a basic consideration for upholding the New York Compensation Law.

It is said if the "scale of compensation" be too small or too large, it would not be "supportable." We have no scale of compensation. It is without limit. It may be ever so "insignificant, on the one hand, or onerous, on the other." Notwithstanding no criticism of the compensation prescribed by the New York statute had been made, the Supreme Court laid much stress upon the necessity of the compensation being definite and reasonable and according to a fixed scale. When that is found in the law, it is said the arrangement is not arbitrary and unreasonable from the standpoint of natural justice. A very different case in fact and in reason from the one at bar. Ours is not a system, but a law suit. When an accident happens, instead of adjustment "according to a reasonable and definite scale", both sides prepare for a contest in the courts with all the attendant evils of the old system. When the litigation is finally ended and the fruits thereof, if successful, are paid

over to the employee, whether inadequate, or excessively large, both he and the employer have been wronged, in that a goodly portion of the recovery has been diverted from the beneficiary into various channels—such as attorney's fees, costs and expenses—all necessary under the system.

Natural justice would dictate that nothing should be taken from the employee, nor would it tolerate the dissipation of the employer's property as an unction to third or foreign parties. Natural justice would require that the amount to be paid by the employer and received by the employee should be reasonable according to a definite scale and should pass unimpaired and undiminished to the beneficiary.

The right of the state to require the employer without fault to compensate the employee or his dependents, when injured in the service of the employer, is referable to the police power. As so many of the courts have said, this power is not capable of exact definition. It is recognized as the right a state has to enact laws for its preservation and betterment. It is elastic in that it expends with social and industrial necessities of the state and may be invoked to promote the health, safety and general welfare of the people. But there is a limit to its exercise. It may not be arbitrarily and capriciously exercised to deprive the citizen either of his property or liberty especially in a case of this kind where there is accruing benefit to neither the individual nor society as a whole. The Supreme Court in the *White* case has pointed out in no uncertain manner how "a just settlement of a difficult problem, affecting one of the most important of social relations" may be solved, and that solution has not been followed or observed in the least by our legislation.

See also :

*Mountain Timber Co. vs. Washington*, 243 U. S., 219,  
61 L. Ed., , 37 Sup. Ct., 260, 13 N. N. C. A.,  
927.

*Hawkins vs. Bleakley*, 243 U. S., 210, 61 L. Ed.,  
37 Sup. Ct., 255.

In the last case cited, it was contended by the Appellant-employer that the Iowa Compensation Act did not conform to "due process of law" in that it provided that if the employer rejected the act it should be presumed, in an action for damages by the employee, that the injury was the direct result of the employer's negligence. The contention was held unsound as it only cast the

burden of proof upon the employer to rebut the presumption of fact and the court said :

" A provision of this nature, not unreasonable in itself and not *conclusive* of the *rights* of the parties, does not constitute a denial of due process of law," citing *Mobile, Jackson and Kansas City R. R. Co. v. Turnipseed*, 219 U. S., 35, 31 Sup. Ct., 136, Ann. Cas., 1912, A., 463. In this last case Justice LUTON said : " \* \* \* it must not under guise of regulating the presentation of evidence, operate to preclude the party from the right to present his defence to the main facts thus presumed. If a legislative provision not unreasonable in itself prescribing a rule of evidence, on either criminal or civil cases, does not shut out from the party affected a reasonable opportunity to submit to the jury in his defence all of the facts bearing upon the issue, there is no ground for holding that due process of law has been denied him."

Thus while it was held the state may change the rules of evidence so as to cast the burden of proof in the first instant upon the employer, it may not take from him all his defenses in actions for damages for personal injury. What may not be done "under the guise" of a rule of evidence surely cannot be accomplished by a direct thrust of the legislature. In both the *Hawkins* and *Turnipseed* cases the court was considering actions for damages for personal injuries where the measure of damages was according to the standards of the common law, and for that reason the rules announced in those cases is the rule that should be applied in the case at bar.

Again in the *Hawkins* case, speaking of the power of the state to abolish the common law defenses of fellow servant, contributory negligence and assumed risk and authorizing a recovery as "for personal injury" when the employer rejects the compensation act or when both the employer and employee rejects it, but reserving unimpaired all these defenses in case the employer accepts and the employee rejects the act, the court said :

" We cannot say that there is here an arbitrary classification within the inhibition of the equal protection clause of the Fourteenth amendment. \* \* \* As already shown, the abolition of such defenses is within the power of the State, and the legislation cannot be condemned when that power has been *qualifiedly exercised* without unreasonable discrimination."

Our liability law not only abolishes the defenses named in a case of the kind we have here, but takes from the employer the right to defend by showing that he was guilty of no fault. The legislation is all in favor of the employee. The employer is given no chance to escape the unlimited liability imposed. The Iowa statute under consideration in the Hawkins case gave the employer the alternative of paying a reasonable compensation according to a definite scale, refusing which, his only defense was to show that he was guilty of no negligence. Our liability offers no alternative, neither can the employer defend by showing he was without fault. Granting that the employer may defend by showing that the employee contributed to the accident or that he assumed risks not inherent in the occupation, an absurdity, it seems to me, still he is deprived of the fundamental right of showing he was without fault, and at the same time made liable for unlimited damages, as in a suit for personal injury according to the standards of the common law—and the law has provided no avenue of escape for him. This, it would seem, is "unreasonable discrimination" against the employer and in favor of the employee. That all defenses may be abolished and absolute liability imposed without fault, according to a reasonable and definite scale is not questioned, but it is inconceivable that one who is guilty of no wrong should be made liable to an injured employee in damages unlimited and unlimitable.

I am constrained to hold that the so-called Employers' Liability Act, in so far as the procedure for the enforcement of the right of action created thereunder is concerned, is not a proper and lawful exercise of the police power of the State, and further that it denies the employer due process of law in that it deprives him of the right to present all his defenses, at the same time allowing unlimited damages against him according to the standard of damages at common law.

At the expense of extending this opinion—too long already—I wish to add: The right of action created by the act is not limited to the employee, or, in case of death, to his dependents. It extends to the parents, whether dependent or not, and the personal representative for the benefit of the estate, in the absence of certain enumerated classes. Thus an employer without fault may be mulcted in damages to an estate which would go to the heirs in no way dependent upon the deceased or, there being no heirs, it would escheat. This I conceive to be contrary to every dictate of natural



justice. All employers in the occupations mentioned are not millionaires—some are just beginning, with no more means than the men they employ. It reaches the small contractor and small mine owner as well as the larger concerns of the State. Yet these, under the law, guilty of nothing other than a laudable ambition to better their condition, and incidentally build up and develop the industries of the state, may be forced to contribute to an estate that owes nothing or that may go to heirs in no way dependent on the deceased, or that may be escheated.

The workmen's compensation laws of the different states and foreign countries without exception, so far as I know, limit the benefits to the employee, or in case he dies, to his *dependents*.

In view of the fact that our Workmen's Compensation Act is not satisfactory to either employer or employee and our Employer's Liability Act, as drawn, is clearly unconstitutional, as I see it, I feel constrained to express my opinion more at length than I otherwise would.

The Workmen's Compensation Act is generally conceded to give inadequate compensation for death and injury. It is compulsory on the employer only. The employee's option to accept under it can be exercised after the injury. *Consolidated Arizona Smelting Co. vs. Ujack*, 15 Ariz., 382, 139 Pac., 465, and is personal to the employee. The beneficiaries of the deceased cannot exercise the option at all or in any case. *Behringer vs Inspiration Consolidated Copper Company*, 17 Arizona, 232, 149 Pac., 1065. It therefore is not a "just settlement" of the rights and wrongs growing out of the relation of employer and employee. This confused, chaotic and unsatisfactory condition has had the attention of both employer and employee with a view of remedying it, but owing to a lack of co-operation by the last legislature with a joint committee representing both sides, nothing was accomplished. It is devoutly to be wished that a just, reasonable and equitable law following the lines of other states, settling the question, may soon find a place in this state.

HENRY D. ROSS,  
Judge.

(25,286)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 478.

THE ARIZONA COPPER COMPANY, LIMITED, PLAINTIFF  
IN ERROR,

v.

RICHARD BRAY.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR  
THE DISTRICT OF ARIZONA.

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1 *Names and Address of Counsel.*

L. Kearney, Clifton, Arizona; Frank E. Curley, Tucson, Arizona,  
Counsel for Plaintiff.

W. C. McFarland and H. A. Elliott, Clifton, Arizona, Counsel for  
Defendant.

2 In the District Court of the United States for the District  
of Arizona.

RICHARD BRAY, Plaintiff,

vs.

THE ARIZONA COPPER COMPANY, LIMITED, a Corporation,  
Defendant.

*Complaint.*

Plaintiff above named complains of defendant and alleges:

1.

That plaintiff is a resident of the county of Greenlee, in the State  
of Arizona, and at the time hereinafter mentioned was, and now is,  
a citizen of the said State of Arizona.

2.

That defendant, The Arizona Copper —, Limited, at all times here-  
inafter mentioned was and now is, a corporation, duly incorporated  
under the Acts of Parliament of the United Kingdom of Great Brit-  
ain and Ireland, known as the Company's Act, 1862 to 1883, hav-  
ing its registered office at Edinburg, Scotland, and at all such times  
was and now is a corporation subject of Great Britain, and that  
it has filed its appointment of its statutory agent in the office of  
the Arizona Corporation Commission, at Phoenix, Arizona, and also  
filed its appointment of its statutory agent in the office of the county  
recorder of the county of Greenlee, State of Arizona, and that it has  
published its articles of incorporation and filed the same in the of-  
fice of said Arizona Corporation Commission, and that it has fully  
complied with all the requirements of law pertaining to foreign cor-  
porations doing business herein mentioned it was, has been,

3 and yet is, such foreign corporation, lawfully doing business  
at said Greenlee County, and engaged in the business of min-  
ing, smelting, conducting machine shops, concentrator works, electric  
plants, railroading, treating and reducing ores, conducting stores,  
and engaged in divers other business pursuits at said Greenlee  
County, in its corporate name of "The Arizona Copper Company,  
Limited."

## 3.

That prior to and on August 4th, 1914, and at the time the plaintiff received the injuries herein complained of, he was employed by and in the employment of the defendant. The defendant is the owner of a mine at Morenci, in said Greenlee County; that in said mine on the said 4th day of August, 1914, the plaintiff was employed by the defendant; that on said day while in said employment while engaged in his said work for the defendant and while acting within the scope of his duties and while acting under the said contract of employment as such employee of the defendant, the plaintiff received injuries to his head and body, in said mine.

## 4.

That the said injuries to plaintiff were occasioned by the condition and conditions of his said employment while working in the hazardous employment as a miner in defendant's said mine and in a tunnel of defendant's said mine while underground; that the circumstances and conditions of said injuries and of said tunnel were as follows: On or about said 4th day of August, 1914, the plaintiff was employed, as a miner, by the defendant to drive a tunnel for the defendant in its said mine; that while engaged in his said employment a large quantity of rock and earth sloughed away from the top of said tunnel and  
4 fell upon and striking plaintiff violently on his head causing him to fall and rendered him unconscious for a long time, and producing in him a weak, giddy, nauseated and confused condition, and which said rock striking him on the head caused  
and abscess \*

contusion, concussion  $\Delta$  of the brain, and resulting in paralysis of the nerves, and in loss of motor power, and permanently disorganized his nervous system, and that on account of said injuries he was for a long time compelled to undergo a hospital treatment at said Morenci, and thereafter necessarily went to Salt Lake City, Utah, for medical treatment, and necessarily expended on such trip \$150, and was necessarily confined in a hospital at said Salt Lake City from Oct. 20, 1914, to Nov. 4, 1914, and ever since said injuries has been under treatment of skilled physicians and surgeons, but has been unable to recover from said injuries, and that his condition is such that he never will be able to recover from said injuries, and that as the direct result of said accident he is greatly injured in body and mind, and that he is not now, and never will be, able to perform any kind of manual labor, and that his said injuries are permanent; that ever since said injuries the plaintiff has been in hospitals and under the care of skilled physicians; that ever since said injuries he has suffered great mental and physical pain, and yet suffers, and will continue to suffer pain. That all of said injuries and pains are the approximate result of said accident. That plaintiff

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\* Interlineation made by Clerk by order of Court. George W. Lewis, Clerk.

has necessarily been out for hospital bills and doctors' fees the sum of \$600.00, all of which are reasonable charges.

## 5.

That at the time of said injuries, the plaintiff was engaged in manual and mechanical labor in the employment of the defendant; that said injuries were the result of an accident due to a condition of such occupation and of a place where the plaintiff was at work; that said injuries were not caused by the negligence of the plaintiff; that said injuries were the natural and proximate result of said condition or conditions of the employment of said plaintiff within said mine and of the place of the performance of said work.

## 6.

That plaintiff at the time of his said injuries was 49 years of age, and was a skilled workman, and then earning wages from \$105.00 to \$120 per month, and capable of earning such wages within the line of his said employment, as such skilled worker; that he was strong, healthy, able bodied and never had any sickness, and was intelligent and industrious; that his expectancy of life at the time of his said injuries was 21.6 years; that since said injury plaintiff has been unable to perform any kind of labor and has lost in wages \$892.00.

That in view of said premises the plaintiff has been and is damaged in the sum of fifty thousand dollars, and for which the defendant is liable.

Wherefore, plaintiff demands judgment against defendant for the sum of fifty thousand (\$50,000.00) dollars; together with cost herein.

FRANK E. CURLEY,  
*Of Tucson, Arizona, and*  
L. KEARNEY,  
*Residing at Clifton, Arizona,*  
*Attorneys for Plaintiff.*

Endorsements: No. 44. Tucson. In District Court of United States, District of Arizona. Richard Bray vs. The Arizona Copper Company, Limited, a corporation. Complaint. Filed June 17, 1915, at 9:40 A. M. George W. Lewis, Clerk, by George C. Pollock, Deputy.

6 UNITED STATES OF AMERICA:

District Court of the United States, District of Arizona.

RICHARD BRAY, Plaintiff,

VS.

THE ARIZONA COPPER COMPANY, LIMITED, a Corporation, Defendant.

Action Brought in said District Court and the Complaint Filed in the Office of the Clerk of said District Court, in the City of Tucson and County of Pima.

The President of the United States of America to the Arizona Copper Company, Limited, a corporation, defendant, Greeting:

You are hereby directed to appear, and answer the Complaint in an action entitled as above, brought against you in the District Court of the United States, in and for the District of Arizona, within twenty days after the service on you of this summons—if served within this County; or within thirty days if served elsewhere.

And you are hereby notified that unless you appear and answer as above required, the said Plaintiff will take judgment for any money or damages demanded in the Complaint, as arising upon contract, or—will apply to the Court for any other relief demanded in the Complaint.

Witness the Honorable William H. Sawtelle, Judge of said District Court, this 21st day of June, in the year of our Lord one thousand nine hundred and fifteen and of our independence the one hundred and thirty ninth.

[Seal of Court.]

GEORGE W. LEWIS, *Clerk*,  
By EFFIE D. BOTTS,  
*Deputy Clerk*.

7 United States Marshal's Office, District of Arizona.

I hereby certify that I received the within writ on the 23rd day of June, 1915, and personally served the same on the 23rd day of June, 1915, upon The Arizona Copper Co., Limited, by delivering to, and leaving with J. G. Copper, as Statutory Agent for the Arizona Copper Company, Limited, a corporation, Said defendant named therein personally, at the County of Greenlee, in said District, a certified copy thereof, together with a copy of the Complaint, certified to by the Clerk of the United States District Court attached thereto.

J. P. DILLON,  
*U. S. Marshal*,  
By IRA N. DILLINER,  
*Office Deputy*.

Returned this June 25th, 1915.  
Marshal's fees \$4.00. Paid by Plaintiff.

Endorsements: Marshal's Docket No. 495. No. 44. Tucson. U. S. District Court, District of Arizona. Richard Bray, Plaintiff, vs. The Arizona Cop-er Company, Limited, a corporation, Defendant. Summons. L. Kearney, Clifton, Arizona, F. E. Curley, Tucson, Arizona, Plaintiff's Attorneys. Filed July 6th, 1915. George W. Lewis, Clerk, by Effie D. Botts, Deputy Clerk.

8 In the District Court of the United States for the District of Arizona.

RICHARD BRAY, Plaintiff,

vs.

THE ARIZONA COPPER COMPANY, LIMITED, a Corporation, Defendant.

*Amended Answer.*

Comes now the defendant, the Arizona Copper Company, Limited, by leave of the court, and files this, its first amended answer, to the complaint of plaintiff, and demurs thereto, and for grounds of demurrer assigns the following:

I.

It appears upon the face of said complaint, in fact it is admitted by the plaintiff as shown by the record, that plaintiff seeks to recover judgment against defendant under and by virtue of the provisions of Chapter VI of Title XIV, Revised Statutes of Arizona, 1913, known as the Employers' Liability Law, enacted pursuant to the provisions of Section VII of Article XVIII, of the Constitution of the State of Arizona, without any charge or showing of negligence, wrong or default on the part of this defendant, causing or contributing to plaintiff's alleged injury, and that said Employers' Liability Law and said Section VII of Article XVIII, of the Constitution of the United States, particularly of the Fourteenth Amendment thereto, in that they seek to deprive this defendant of its property without due process of law, and to deny it the equal protection of the laws of the State of Arizona, by subjecting it to unlimited liability for damages for personal injuries suffered by its employee without any fault, wrong, or negligence on the part of this defendant,  
9 causing such injuries or contributing thereto, and that for the reasons in this paragraph above set forth, said complaint, does not state facts sufficient to constitute a cause of action against this defendant.

II.

That it appears on the face of said complaint that plaintiff seeks to recover judgment against defendant under and by virtue of the provisions of Chapter VI, of Title XIV, of the Civil Code, Revised Statutes of Arizona, 1913, known as the Employers' Liability Law, and that said Employers' Liability Law is in violation and contravention of the Constitution of the State of Arizona, and particu-

larly of Sections 5 and 7, of Article XVIII thereof, in that said Employers' Liability Law attempts to give plaintiff the right to recover damages of defendant in this action notwithstanding the injuries for which such damages are claimed were contributed to and in part caused by plaintiff's own negligence, and attempts to deprive defendant of the right to wholly defeat this action by showing that said injuries were contributed to and in part caused by plaintiff's own negligence, and that for the reasons in this demurrer set forth, said complaint does not state facts sufficient to constitute a cause of action against defendant.

### III.

That it does not appear in and by the allegations of plaintiff's complaint that plaintiff at the time and place of his alleged injury or injuries was engaged in a labor, service, employment or occupation in any way or manner mentioned and provided for in Chapter 6 of Title 14 of the Revised Statutes of the State of Arizona, 1913.

10

### IV.

That it does not appear in and by the allegations of said complaint that plaintiff's alleged injury or injuries were caused by or resulted from any accident or accidents to this plaintiff in the course of work in his employment or occupation, as in said complaint alleged and set forth, arising out of and in the course of plaintiff's labor, service and employment and due to a condition or conditions of plaintiff's said occupation or employment.

### V.

That it appears in and by the allegations of said complaint that if this plaintiff has any cause of action against this defendant, it is by reason of the negligence of this defendant, its servants, employees or other agents, and not by reason of an accident or accidents to this plaintiff in the course of work in his employment or occupation as in said complaint alleged, arising out of and in the course of his labor, service and employment and due to a condition or conditions of his said occupation or employment.

### VI.

That it does not appear in said complaint that plaintiff's alleged injury or injuries was not caused by his own negligence.

### VII.

That it appears in said complaint that the alleged injury or injuries of this plaintiff, if any there were, were occasioned, wholly by, and resulted from the usual and ordinary risks of the employment in which plaintiff was engaged at the time and place of the said alleged injury or injuries as in said complaint described, and



11 were wholly assumed by this plaintiff in entering on and continuing in said employment, or by the exercise of reasonable diligence on the part of this plaintiff, could have been fully known to and appreciated by him, in that it is not alleged in said complaint that the dangers of said employment at the time and place and in the manner mentioned and described in said complaint, were latent or hidden from or undiscovered to this plaintiff, and that by the exercise of due or any diligence or care for his personal safety, that he could not have discovered said conditions and have thereby avoided his said injury or injuries.

### VIII.

That it is not alleged in said complaint that the acts and things done or said by the officers, servants, employees or other agents of this defendant, at the time and place of plaintiff's alleged injury or injuries by this plaintiff in his complaint alleged to have caused the said injury or injuries, were done and said by such officers, servants, employees or other agents of this defendant, while acting within the course of the employment and within the scope thereof of said officers, servants, employees or other agents, while then and there in the employ of this defendant.

### IX.

That said complaint does not state facts sufficient to constitute a cause of action against this defendant.

Wherefore defendant prays judgment as to the sufficiency of said complaint in the particulars hereinabove specified and that plaintiff take nothing thereby and that defendant go hence with its costs.

W. C. McFARLAND,

H. A. ELLIOTT,

*Attorneys for Defendant.*

Without waiving any of the foregoing demurrers, but if the same shall be overruled or denied, this defendant further answering  
12 ing said complaint admits, denies and alleges as follows:

#### 1.

Admits the allegations of Paragraphs 1 and 2 of plaintiff's complaint.

#### 2.

Admits that prior to and on August 4th, 1914, \*(and at the time this plaintiff received the injury or injuries mentioned and complained of in said complaint,) plaintiff was employed by and in the employment of this defendant. Denies that this plaintiff received injury or injuries in defendant's mines as mentioned and described in said complaint on last said date or at any other time while this plaintiff was engaged in his work for the defendant, or while acting in the scope of his duties as miner, as in said complaint described

or at any other time or at all. And in this connection this defendant alleges that if plaintiff received any injury or injuries at the date in said complaint alleged, or at any other time, said injury or injuries were the direct and proximate result of the \*(carelessness and) negligence of plaintiff, and but for said \*(carelessness and) negligence on the part of the plaintiff said injury or injuries, if any, would not have happened.

## 3.

Defendant answering Paragraph 4 of said complaint, denies that the injury or injuries, if any, were occasioned by the condition or conditions of his said employment while working in a hazardous employment as a miner in defendant's said mine, or in a tunnel of said defendant's said mine; and defendant further answering said Paragraph 4 denies that on the 4th day of August, 1914, or at any other time while plaintiff was engaged in driving a tunnel for defendant in its said mine, and denies while plaintiff was engaged in  
13 his said employment on said 4th day of August, 1914, or at any other time, a large quantity of rock and earth sloughed away from the top of said tunnel and fell upon and struck plaintiff violently on his head, and denies that the rock and earth in said paragraph alleged at the time stated in said paragraph, or at any other time, fell upon the head of plaintiff, and denies that the result of said fall of said rock and earth caused at the time stated in the complaint, or at any other time, or at all, the results as in said Paragraph 4 stated. And further answering said Paragraph 4 denies that the effect of the fall of the rock and earth, as in plaintiff's complaint alleged, produced contusion and concussion of the brain; denies that the same resulted in paralysis of the nerves, loss of motive power, but admits that plaintiff underwent hospital treatment at Morenci, Arizona, but as to his treatment in Salt Lake City, Utah, and the expenditure of \$150 therefor, defendant has no knowledge or information sufficient to form a belief, and therefore denies the same. Denies that said injury or injuries, if any, were permanent.

## 4.

\*(For further defense to said complaint defendant alleges that the alleged injury or injuries, if any, were suffered by plaintiff, either as alleged in said complaint, or otherwise, were wholly occasioned by and wholly resulted from the open, usual and ordinary risks from the employment in which plaintiff was engaged at the time and place of his alleged injury or injuries, as in said complaint described, which said risks of said employment were wholly assumed by plaintiff by entering upon and continuing in said employment. That said risks were fully known to and appreciated by said plaintiff in entering upon and continuing in said employment, or by the exercise of reasonable diligence on his part, should have been fully known and appreciated by him.)  
14

Wherefore, defendant prays that plaintiff take nothing by his action, and for its costs.

W. C. McFARLAND,  
H. A. ELLIOTT,  
*Attorneys for Defendant.*

\*(Further answering said complaint as a separate defense to this action, defendant alleges that the alleged injury or injuries, if any, were suffered by plaintiff, either as alleged in said complaint or otherwise, by plaintiff's own want of care, and but for such want of care such accident or injury would not have occurred.)

Wherefore, defendant prays that plaintiff take nothing by his said action, and for its costs.

W. C. McFARLAND,  
H. A. ELLIOTT,  
*Attorneys for Defendant.*

Defendant further answering said complaint denies each and every allegation therein contained, except those expressly admitted, and having fully answered, asks to be discharged with its costs.

W. C. McFARLAND,  
H. A. ELLIOTT,  
*Attorneys for Defendant.*

NOTE.—\*Denotes portions stricken out of original amended answer as shown by minutes.

Endorsements: No. 44 Tucson. In the District Court of the United States for the District of Arizona. Richard Bray vs. The Arizona Copper Company, Limited, a corporation, First Amended Answer. Filed Nov. 2, A. D., 1915, at 10:30 A. M. George W. Lewis, Clerk, by Effie D. Botts, Deputy Clerk.

15 In the District Court of the United States for the District of Arizona.

RICHARD BRAY, Plaintiff,  
vs.  
THE ARIZONA COPPER COMPANY, LIMITED, a Corporation, Defendant.

*Demurrer.*

Comes now plaintiff, Richard Bray, and demurs to paragraph four of defendant's answer found on page six thereof, for the reason that the same does not constitute, or tend to support, any defense to plaintiff's cause of action, set forth in his complaint.

L. KEARNEY,  
FRANK E. CURLEY,  
*Attorneys for Plaintiff.*

Endorsements: No. 44 Tucson. In the District Court of the United States, District of Arizona. Richard Bray, Plaintiff, vs. The Arizona Copper Company, Limited, a corporation, defendant, Demurrer. Filed Nov. 2, 1915. George W. Lewis, Clerk, by Effie D. Botts, Deputy Clerk.

16 In the United States District Court for the District of Arizona.

No. 44.

RICHARD BRAY, Plaintiff,

VS.

THE ARIZONA COPPER COMPANY, LIMITED, a Corporation, Defendant.

Minute Entry Made on Tuesday, November 2nd, 1915.

Upon motion of the defendant, it is ordered that the defendant be granted leave to file an amended answer herein and thereupon defendant files said amended answer. Thereupon it is ordered by the Court that the demurrer of the defendant to plaintiff's complaint be and the same is hereby overruled, to which ruling of the court, defendant excepts. Thereupon the plaintiff moves the court to strike from the defendant's amended answer in lines five and six at the top of page five the words "Carelessness and," which motion is granted by the Court and said words ordered stricken from defendant's amended answer, to which ruling of the court, defendant excepts. Thereupon plaintiff moves the Court to strike from defendant's amended answer on page six of paragraph four, beginning with the words "Further answering said complaint as a separate defense" down to and including the words "injury would not have occurred" and upon consideration by the Court it is ordered that said motion be and the same is hereby granted by the Court, to which ruling of the Court, defendant excepts. Thereupon it is ordered by the Court that plaintiff's demurrer to defendant's answer as contained in paragraph 4 at the top of page six be and the same is hereby sustained, to which ruling of the Court, defendant excepts.

17 In the United States District Court for the District of Arizona.

No. 44.

RICHARD BRAY, Plaintiff,

VS.

THE ARIZONA COPPER COMPANY, LIMITED, a Corporation, Defendant.

Minute Entry Made on Monday, November 29th, 1915.

The plaintiff this day asks leave of the Court to amend his complaint herein by striking out the word "and" at the end of line 23

on page 2 of said complaint and by inserting after the word "concussion" in line 24 on page 2 of said complaint, the words "and abscess" and it is ordered by the court that said amendment be allowed and that the Clerk insert said amendment in ink and note same on the margin of the complaint and same is done by the Clerk in open Court.

18

*Proceedings of the Trial Cause.*

In the United States District Court for the District of Arizona.

No. 44.

RICHARD BRAY, Plaintiff,

vs.

THE ARIZONA COPPER COMPANY, Limited, a Corporation, Defendant.

Minute Entry Made on Thursday, December 2, 1915.

This case came on this day regularly for trial, the plaintiff appearing in person and with his counsel, F. E. Curley, Esquire, and L. Kearney, Esquire, comes now the defendant herein by its counsel, W. C. McFarland, Esquire, and H. A. Elliott, Esquire, and both parties announce ready for trial. A jury of eighteen was called, sworn and examined as to their qualifications. F. O. Benedict, was excused by the Court, neither side objecting, and Henry Meyer, Jr., was called, sworn and examined in his place. The eighteen jurors now in the jury box were all found to be qualified and accepted by both sides. Thereupon the plaintiff strikes three and the defendant three, and the remaining twelve, to-wit: W. B. Dolan, James Hall, B. E. Snyder, R. Schurtz, O. A. Haskins, James F. Cunningham, O. M. Anderson, B. M. Pachon, L. G. Moore, O. Z. Kane, Edward W. Borton, and Henry Meyer, Jr., were called according to law and sworn to well and truly try the issues joined herein. H. C. Nixon was used as court reporter in this case. The defendant asks leave of the

19 Court to amend its amended answer herein by striking out the words "and at the time this plaintiff received the injury or injuries mentioned and complained of in said complaint" in paragraph 2 on page 4 of defendant's amended answer and said amendment is allowed by the court. L. Kearney, Esquire, reads plaintiff's complaint and makes opening statement. H. A. Elliott, Esquire, reads defendant's amended answer and waives and reserves making statement until plaintiff's evidence is all in. Defendant invokes the rule and all witnesses for plaintiff and defendant, except plaintiff are excluded from the Court room during the trial of this case. The plaintiff then to maintain upon his part the issues herein, called as witness, Richard Bray, who was sworn, examined and cross examined. The deposition of Dr. Root was read in evidence in this case. The hour for adjournment having arrived and the trial of this case not having been completed, the Court duly admonished the jury and excused them from further attendance upon this case until Friday, the 3rd day of December, A. D., 1915, at 9:30 o'clock A. M.

## Minute Entry Made on Friday, December 3rd, 1915.

This case having been continued from a previous session of this Court, comes now the parties hereto, and comes also the jurors herein, their names are called and all answering thereto respectively, the further trial of this case proceeds as follows. The reading of the deposition of Dr. E. F. Root was resumed and completed. The depositions of Dr. Brown Ewing, Dr. J. O. Evans, Dr. John J. Galligan, were read in evidence. Dr. Mead Clyne was called as a witness on behalf of the plaintiff, sworn, examined and cross examined. Dr. I. E. Huffman was called as a witness on behalf of the plaintiff, sworn, examined and cross examined. Mrs. Mable Bray was called as a witness on behalf of the plaintiff, sworn, examined and cross examined and thereupon the plaintiff rested his case. The plaintiff Richard Bray was called as a witness for the defendant under the statute as if on cross-examination and was examined. The defendant then called as witnesses on its behalf, Richard Williams, Dr. Butler, Dr. G. Goodrich, Dr. Mark Rodgers and Noah Green, who were duly sworn, examined and cross examined and thereupon the defendant rested its case. Richard Bray was recalled by the plaintiff in rebuttal and further examined and cross examined. Dr. Huffman was recalled by the plaintiff in rebuttal and further examined and cross examined, and thereupon the plaintiff rested his case. Thereupon the defendant moves the Court to direct the jury to bring in a verdict for the defendant on the following grounds:

1st. That it has not been shown that plaintiff's condition is due to an injury received in defendant's employ and due to a condition or conditions of plaintiff's employment;

2nd. That the evidence would not support a verdict for the plaintiff.

3rd. That the Employers' Liability Act under which plaintiff seeks to recover is unconstitutional, for the reason that it fixes an unlimited liability upon defendant without fault, and deprives the defendant of the equal protection of the laws, and of its property without due process of law.

And said motion is denied by the Court, to which ruling of the Court, defendant excepts. There being no further testimony offered by either side and the evidence being closed, argument was had on behalf of the plaintiff by Frank E. Curley, Esquire. Thereupon defendant waives argument, and the hour for adjournment having arrived, the court duly admonished the jury and excused them from further attendance upon this court until Saturday, the 4th day of December, A. D., 1915, at 9:30 A. M., to which time the further hearing of this case is now ordered continued.

## 21 Minute Entry Made on Saturday, December 4, 1915.

This case having been continued from a previous session of this Court, comes now all the parties hereto and comes also the jurors herein, their names are called and all answering thereto respectively,

the further trial of this case continues. The arguments of counsel having been waived and completed on yesterday, the Court now instructs the jury orally and thereupon the defendant excepts to that portion of the charge to the jury which defines the term "condition or conditions of *him* employment" for the reasons set out in the reporter's transcript and notes. Thereupon the jury retire in charge of L. V. Russell, bailiff, officer of this court, first duly sworn for that purpose, to consider their verdict. And subsequently said jury return into court, their names are called and all answering thereto respectively, upon being asked if they have agreed upon a verdict, report that they have agreed and thereupon present the following verdict:

"RICHARD BRAY, Plaintiff,

vs.

ARIZONA COPPER COMPANY, LIMITED, a Corporation, Defendant.

*Verdict.*

We, the July duly empaneled and sworn in the above entitled action, upon our oaths do find for the plaintiff and assess his damages at the sum of \$9000.00.

O. Z. KANE, *Foreman.*

Thereupon it is adjudged that the plaintiff is entitled to recover of and from the defendant the sum of \$9000.00, with costs, and it is ordered that judgment be entered in favor of the plaintiff and against the defendant in accordance with the verdict. Thereupon the jury is ordered discharged from this case. Upon stipulation of counsel it is ordered that the defendant may have a stay of execution of forty-two days from this day in which to prepare and file its motion for a new trial herein.

23

RICHARD BRAY, Plaintiff,

against

ARIZONA COPPER COMPANY, LTD., a Corporation, Defendant.

*Verdict.*

We, the July, duly empaneled and sworn in the above entitled action, upon our oaths, do find for the plaintiff and we do assess his damages at the sum of Nine Thousand Dollars.

O. Z. KANE, *Foreman.*

Endorsements: No. 44 Tucson, United States District Court, District of Arizona. Richard Bray, Plaintiff, vs. Arizona Copper Co., Ltd., a corporation, Defendant. Verdict. Filed Dec. 4, 1915. George W. Lewis, Clerk.



- 24 In the District Court of the United States for the District of Arizona.

RICHARD BRAY, Plaintiff,

VS.

THE ARIZONA COPPER COMPANY, LIMITED, a Corporation,  
Defendant.

*Judgment.*

This action came on regularly for trial the 2nd day of December, 1915, the plaintiff being present and represented by his attorneys L. Kearney, Esq., and Frank E. Curley, Esq., and the defendant being represented by its attorneys W. C. McFarland, Esq., and H. A. Elliott, Esq., A jury of twelve men were regularly impanelled and sworn to try said action. Witnesses on the part of plaintiff and defendant were sworn and examined. After hearing the evidence and argument of counsel and the instructions of the court the jury retired to consider of their verdict and subsequently, on the 4th day of December 1915 returned into court and being called answered to their names and say that they find the verdict for the plaintiff and against the defendant in the sum of nine thousand (\$9,000) dollars.

Wherefore, by virtue of the law and by reason of the premises aforesaid, it is ordered, adjudged and decreed that the plaintiff Richard Bray do have and recover of and from said defendant, The Arizona Copper Company, Limited, a corporation, the sum of nine thousand (\$9,000) dollars with interest thereon at the rate of six (6%) per cent per annum from date hereof until paid together with the plaintiff's costs and disbursements incurred in this action amounting to the sum of \$184.55, with interest thereon at the rate of six (6%) per cent per annum from date hereof until paid, and for which let execution issue.

- 25 Judgment rendered December 4th, 1915.

Endorsements: No. 44 Tucson. In the District Court of the United States for the District of Arizona. Richard Bray, Plaintiff, vs. The Arizona Copper Company, Limited, a corporation, Defendant. Judgement. Filed December 4th, 1915. George W. Lewis, Clerk. By Effie D. Botts, Deputy Clerk.

- 26 In the United States District Court for the District of Arizona.

RICHARD BRAY, Plaintiff,

VS.

THE ARIZONA COPPER COMPANY, LIMITED, a Corporation,  
Defendant.

*Proposed Bill of Exceptions.*

Be it remembered, that on the 2nd day of December A. D., 1915, at a regular and stated term of the United States District Court for



the District of Arizona, the same being one of the regular judicial days of the November term of court, 1915, begun and holden in the City of Tucson, Arizona, before his Honor, William H. Sawtelle, District Judge, the issues joined by the pleadings in said cause came on to be tried by the said Judge and the jury empanelled and sworn to try the issues in said cause. The plaintiff was represented by L. Kearney, and F. E. Curley, his attorneys and the defendant by W. C. McFarland and H. A. Elliott, its attorneys.

To sustain the issues on the part of the plaintiff and on the part of the defendant, the following evidence was introduced.

27 In the District Court of the United States, District of Arizona.

Case No. 44.

RICHARD BRAY, Plaintiff,

vs.

THE ARIZONA COPPER COMPANY, LIMITED, a Corporation,  
Defendant.

Before Honorable William H. Sawtelle, Presiding Judge.

(Tucson, Ariz., December 2nd, 1915.)

*Transcript of Testimony.*

Appearances:

For the Plaintiff: L. Kearney, Esq., F. E. Curley, Esq.

For the Defendant: W. C. McFarland, Esq., H. A. Elliott, Esq.,

Be it remembered that this cause coming regularly on for trial on Thursday, December 2nd, 1915, before the presiding judge of the above-entitled court and a jury duly empanelled and sworn to try the issues, the following proceedings were had and testimony introduced, to-wit:

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29 Mr. Curley: If your Honor please, we will ask at this time that the witnesses be called and placed under the rule.

(All the witnesses in the case were called and sworn, and after being duly admonished by the Court were excluded from the court room.)

Mr. Elliott: If the Court please, I will direct your Honor's attention to a phrase appearing in the defendant's answer on page 4, under Paragraph 2 of that answer: "Admits that prior to and on August 4, 1914, at the time this plaintiff received the injuries mentioned and complained of in said complaint, plaintiff was employed by and in the employ of this defendant." There is an error or a slip in the statement of the pleading there. As worded, it might imply an admission of the receiving of injuries on the part of the plaintiff, which is not the intention at all; and we will ask at this time to amend by striking out beginning with the words, "and at the time" at the end of the first line in Paragraph 2, down to and including the word "complaint" in the third line of said Paragraph 2.

The Court: Well, the next sentence shows that you deny that he received any injury or injuries at all. Any objection to that?

Mr. Curley: No, we have no objection, if your Honor please.

The Court: Those words may be stricken out. You may read your complaint to the jury.

Mr. Kearney: Gentlemen of the jury, I will read to you the plaintiff's complaint.

(Counsel for plaintiff read the complaint to the jury.)

The Court: The defendant will read the answer.

Mr. Elliott: If the Court please, and gentlemen of the jury, I will now read defendant's answer to the merits of this case, beginning on page 4, paragraph- 1 and 2.

(Counsel for defendant read the answer to the jury.)

Mr. Curley: Paragraph 4 was stricken out.

Mr. McFarland: Has your Honor any memoranda that would refresh you- mind on that?

The Court: Where were you reading from, Mr. Elliott?

Mr. Curley: Page 6 of the answer, in the middle of the page.

The Court: Yes, I struck that out because it is a plea of negligence, and that plea has already been interposed.

Mr. McFarland: Negligence on the part of the plaintiff.

30 The Court: Yes, as I understand it.

Mr. Curley: That is was surplusage.

The Court: Yes, your plea Number 2 of your answer sets up that the injury, if any was sustained, was by reason of the negligence of the plaintiff, and therefore, if that was not stricken out, it should be, and if you haven't had an exception, I will not give you one.

Mr. McFarland: We will take an exception now, if your Honor please.

The Court: The Clerk will examine his minutes, and if I am in error about this, why the record will be corrected.

Mr. McFarland: I understand that the separate answer there has been stricken out, except the general denial.

The Court: No, the general denial and the special plea of negligence on the part of the plaintiff.

Mr. McFarland: Those remain?

The Court: They remain.

Mr. McFarland: So that the record will speak the truth, because that is all we care for.

The Court: The Clerk will examined his minutes and refer to it.

Mr. Curley: That was done on the 2nd of November.

The Court: Go ahead. Call your witness.

Mr. Elliott: If the Court please, the defendant at this particular time waives its right to make a statement of the case. We will do so before the presentation of our defense.

The Court: Very well, you may do so.

RICHARD BRAY, the plaintiff herein, called as a witness in his own behalf, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Kearney:

Q. State your name?

A. Richard Bray.

Q. What is your age, Mr. Bray?

A. Forty-nine.

Q. When were you forty-nine?

A. Last July I was forty-nine.

Q. What place do you claim as your residence?

A. Arizona?

Q. What?

A. Arizona.

Q. You claim Arizona?

A. Yes sir.

Q. I will ask you if you are the Richard Bray named in this paper? (Handing paper to witness.)

A. Yes sir.

31 Q. That was issued to you?

A. In 1900, final papers, in 1888 for the first time.

Mr. McFarland: If the Court please, before he is examined on that subject, we would like to see that paper.

The Court: I understand the answer admits the citizenship, does it not?

Mr. Kearney: Yes, it does.

The Court: Why do you want to prove it? It is a loss of time.

Mr. Kearney: I will ask to introduce this and have it marked as Plaintiff's Exhibit 1.

The Court: No, I decline to admit any paper that is not required to be introduced in evidence. It is taking up the time of the court unnecessarily. We will only try the issues that are raised by the pleadings.

Mr. Kearney:

Q. Mr. Bray, what is your vo-ation? What do you follow for a living?

A. Miner.

Q. How long have you followed mining?

A. Oh, about something like thirty years, a little more.

Q. You were in the employ of the defendant in this case?

A. Yes sir.

Q. As a miner?

A. Yes sir.

Q. On or about the 4th of August, in the year 1914, were you in the employ of the defendant at that time?

A. Yes sir.

Q. In what capacity?

A. As a timberman.

The Court:

Q. Timberman in a mine?

A. Yes sir.

Mr. Kearney:

Q. What mine, do you remember?

A. The Humboldt of the Arizona Copper Company.

Q. Was that underground or what?

A. Underground, yes.

Q. About what depth?

A. About twenty-five or thirty feet.

Q. Were you running a tunnel at that time?

A. Yes sir, repairing it.

Q. And what did the defendant company pay you as wages for your work?

A. Forty-seven cents an hour for seven and one-half hours.

Q. Do you know what the usual wages of a miner are for doing this work that you were doing at that time?

A. Well, a timberman about three and one-half a day, I presume, three-forty or something like that—difference in prices.

Q. At this time did you receive an injury in the mine?

A. I received in the mine?

Q. Did you receive an injury in the mine?

A. Yes sir; on or about the 4th of August.

Q. Now, how did that injury happen?

A. We were taking out old timbers and putting in new and raising the roof—making the tunnel higher. In order to do that we had to take down some ground to get in the new timbers. We put in another post, and we worked all the shift at that—got it about completed—well, it was completed. And about half an hour before quitting time I was hit with this rock. I would like to show the jury,

Q. Sure, come forward here and show the jury.

A. Here is—when we got through—

The Court: You had better turn around.

The Witness: I want to explain myself against this wall.

Mr. Kearney: Go ahead.

A. And when we just about got through I felt quite satisfied with my day's work, and made a remark to my partner—

Q. No, never mind the remark, but just tell what happened to you there.

A. Well, I got struck. I looked at the work and was satisfied with it, and turned around right in this manner, (illustrating) or was turning facing my work in this way (illustrating) and turned around like this (indicating) to go towards him—he was about four or five feet that way (indicating), to go to him and this here rock fell out of the side and struck me on the head. In the meantime I was dazed and just turned around a little to the right. There is a cross-cut there, what they call the cross-cut, and I was knocked dazed, turned right around and fell over in that direction, and he came to my assistance.

Q. You need not state what he said.

A. He came to my assistance and picked me up and took me towards the—an old post that had been took out previous. As near as I can remember, he put me there to sit down. He examined my head and asked me if I was—

Q. Never mind what he asked you. Just state what happened to you there.

A. Well, I went to sit down, and I was dazed and knocked out. He wanted to take me home, and I says, "I will wait now." I said "The shift is pretty near through."

Q. Never mind what you said to him.

A. In around about a half an hour, and I stayed there.

Q. Do you know what hit you on the head?

A. Yes sir; a rock struck me.

Q. Now state the condition of that mine. Did you have to use candles to light your way in there?

A. Yes sir.

Q. And the only light you had was each one a candle?

A. Just my candle.

Q. No, other light in the mine?

A. No sir.

Q. Then after that did you do any other work or not there?

A. I did, I followed my employment up until the 18th.

Q. Never mind. what you told.

The Court: He said he followed his employment up to the 18th.

The Witness: Yes.

Mr. Kearney:

Q. Followed your employment up to the 18th?

A. Yes.

Q. The 18th of what month?

A. Of August.

Q. Then where did you go after that?

A. I went to the hospital.

Q. At Morenci?

A. Yes sir.

33 Q. How long did you stay at the hospital?

A. Not long that time. I went home after that.

The Court:

Q. How long, while you are on that point, how long?

Mr. Kearney:

Q. About how long were you in the hospital in Morenci?

A. At that time just about an hour or so, I guess.

Q. Well, take all the time together.

A. Oh, I was in the hospital a week or ten days altogether.

Q. Then where did you go to from there, Mr. Bray?

A. I went to Salt Lake City.

Q. What was your object in going to Salt Lake City?

A. To be treated and get in closer connection with my lodge, the Odd Fellows and Knights of Pythias.

Q. What money were you out on your trip from Morenci to Salt Lake City?

A. About \$150 as near as I could judge, \$200, something in that matter.

Q. About \$200?

A. Yes sir.

Q. Did you pay that much in going up there?

A. No sir; the Odd Fellows gave me \$100.

Q. And where did the other fund come from?

A. And the Knights of Pythias.

Mr. Elliott: If the Court please, we will ask that that evidence be stricken out.

The Court: It may be stricken out. What the lodge gave him is stricken out.

Mr. Kearney:

Q. Now, what is your condition, or what was it when you went to Salt Lake City?

A. Well, I couldn't hardly walk, and dizzy. I had to be led.

Q. What was the nature of the difficulty, Mr. Bray?

A. Well, my legs was stiff and I had to just pull them right around—catch hold—if I had to stand or walk in any way I had to pull myself—catch hold of anything that was in my reach and pull myself over. That is the only way I could get around.

Q. When did this trouble first come on you?

A. Why, several days after the accident I began to get dizzy.

Q. Come on you gradually?

A. Yes sir.

Q. And then did it continue to get worse?

A. Yes sir.

Q. State what particular effect it had upon your walking or moving?

A. Well, I couldn't hardly get around. I don't know what the reason was. I was affected by the blow—my whole system, and I couldn't walk, I couldn't eat nor sleep.

Q. What did you do at Salt Lake City? Did you have to go to the hospital there or not?

A. Yes sir; to the Holy Cross.

Q. Any physician there operate on you?

A. Yes sir.

Q. Who was that?

A. Doctor Root and several assistants. I suppose they were assistants.

Q. They performed an operation on you, you say?

A. Yes sir.

34 Q. How long were you in the hospital there?

A. I went in the hospital the 23rd of October, and came out I believe it was the 6th or 7th of November.

A. 1914?

A. 1914, yes sir.

Q. After you came out of the hospital what change did you notice in your condition, if any?

A. Why, after I got out of the hospital, when I got to moving around, I could walk better considerable, but my system, all the time when I come to touch anything or push, or anything, why, there was something run through my system, and all the time go to the head where I was operated on.

Q. And how does that injury affect you now?

A. Just the same.

Q. In what particular way? Explain to the jury.

A. Why, if I lift at anything, or use the pick, or anything like that—pull—why, it all goes right there (indicating) to the head. In the mornings, when I get out in the morning there is a tendency

that something is pulling me, that I couldn't walk as I ought to walk. It keeps a dragging.

Q. Have you been able since that time to do any manual labor?

A. Well, all I have done is work in the city park a few shifts, a few days; that is all.

Juror Anderson: I did not understand the last answer.

The Witness: I said I just worked a few days in the city park since the accident.

Mr. Kearney:

Q. My. Bray, before this injury did you ever have any sickness?

A. No sir.

Q. Did you ever have any ear troubles?

A. No sir.

Q. Did you ever suffer any accident of any kind?

A. No sir.

Q. Now for a number of years prior to this had you at any time had any injury at all or illness of any kind?

A. No sir; no, not an injury. I would state that when I was about sixteen or seventeen years of age in the mine, in England, I fell in a ladderway, but I couldn't have been very badly hurt at that time because I walked pretty near four or five miles to my home. And that is the only—if you call it an accident.

Q. At that time did it injure your head any?

A. No sir.

Q. Your head did not hit against anything that time?

A. No sir.

Q. You have had no illness of any kind?

A. Never; no sir.

Q. For a number of years prior to this injury?

A. No sir.

Q. Always able to report for your work?

A. Yes sir; of course, I have had a cold; I have had a cold — like, nature calls, or a bilious attack; that is all. But never sick.

Q. You say you had an operation performed on your head. Come over here. Now, where was that operation performed on your head?

A. Right here (indicating).

Mr. Kearney: You gentlemen will observe in here the hollow of the head. There is a depression here. That is where the  
35 operation was performed. Any of you wish to examine it?

Juror Haskins: No, I can see that there is a depression there.

Mr. Kearney:

Q. Now, I wish you would tell the jury how you first noticed this dizziness or staggering, that time—what effect it had upon you.

A. Well, when it started in, in the first place, I was just the same as a drunken man, and I was all the time—me head would go faster than me legs, and all the time go towards the left-hand side. I had a tendency to go away that way (indicating) all the time. But



me head would always seem to want to be first, and I couldn't hold me head up this way, as I am doing now: I just looked down on the ground.

Q. Did that gradually get worse until you were operated upon?

A. That gradually got worse until I was operated upon; yes sir.

Mr. Kearney: You may cross examined.

Juror Haskins: I would like to ask the witness one question.

Q. Why is it that you did not continue in employment for the city in the city park. You said you worked two or three days.

A. I worked a few days. Why, they laid off the men. Winter time, you know—you see, they laid them off.

The Court:

Q. Where was that park, what place?

A. Liberty Park in Salt Lake City.

Q. Salt Lake City?

A. Yes sir.

Q. How many days did you work there?

A. I worked at one time from twelve to fifteen days. I was laid off with a crowd, and then I went to work again something like a month or so after and worked eleven days.

Q. What kind of work did you do?

A. Oh, just scraping up leaves and cleaning up.

The Court: Go ahead and cross examine.

Cross-examination:

By Mr. Elliott:

Q. How do you fix the date of this injury as the 4th of August, 1914, Mr. Bray?

A. I said from the 1st to the 4th.

Q. It may have been prior to the 4th; it may have been a few days prior to the 4th?

A. Yes, it was up around that time.

Q. You received your injury from the 1st to the 4th of August?

A. Yes sir; leaving out a Sunday.

Q. That is, you worked a period of at least fourteen days and probably fifteen or sixteen days after you received your injury?

A. Yes.

A. That is true?

A. Yes sir.

Q. That is a positive fact?

A. Well, I don't remember losing any time.

36 Q. Well, that period intervening of fourteen or fifteen or sixteen days from the date of your injury until the time you quit work for the Arizona Copper Company at Morenci?

A. What is that question?

(Question read.)

A. Well, I worked after I got injured until the eighteenth.

Q. Did you report that injury to your shift boss?

A. Not at that time. I did when I went to work on the eighteenth, on the morning of the eighteenth I told him that I wasn't feeling well, I said to my shift boss; and he said "Well, if you aren't feeling well, you can lay off." "Well," I said, "I would like to try for awhile." "Well," he said, "All right." So I went up and tried it until nine o'clock and at nine o'clock I came home on the morning of the eighteenth.

Q. That was the day you quit work?

A. That is the day I quit.

Q. What was the name of that shift boss, Mr. Bray?

A. Richard Williams.

Q. Who was working with you at the time of your injury?

A. Noah Green.

Q. How far was Noah Green standing from you at the time this rock struck you on the head?

A. About four or five feet, as near as I can tell.

Q. You stated that this injury which you claim was caused by the falling of the rock upon your head occurred just prior to the closing of your shift for that day.

A. Yes sir.

Q. What time did you shift close?

A. Why, 4:30, I believe; I am not positive.

Q. You would put the injury then somewhere about four o'clock between four and four-thirty?

A. I was injured somewhere about that time, just about a half an hour previous to quitting, as near as I can tell. Of course, my memory might not be so good now as it was then.

Q. Was your deposition taken in Salt Lake City, Utah, on the 4th day of October, 1915, before one J. S. Farrington, a Notary Public, and in the office of G. W. Sullivan, who was acting as your attorney?

A. It was, I couldn't tell the date now.

Q. About that time?

A. Yes sir.

Q. It was so taken?

A. Somewhere about that time.

Q. You answered questions that were propounded to you there, answered questions under oath?

A. Mr. Sullivan, I presume—

Q. I say, did you answer questions?

A. Yes, I answered questions, certainly.

Q. Under oath that were propounded to you there?

A. Yes, I answered questions.

Mr. Elliott: Mr. Clerk, has that deposition been opened yet?

The Court: You may open the deposition, Mr. Clerk.

Mr. Elliott:

Q. Mr. Bray, did you or did you not report the fact of your injury to Richard Williams, your shift boss, on the 18th of August 1914, the day on which you quit work?

A. I did not.

37 Mr. Kearney: I object to that as not cross examination.  
The Court: Objection overruled.

Mr. Elliott:

Q. You reported your injury?

A. No sir, none whatever.

Q. Now, I will ask you if it is not a fact that at the taking of this deposition in Salt Lake City on the 4th day of October, 1915, this question was asked you: "What was the name of the shift boss to whom you reported your injury," and you answered, "Richard Williams"?

A. Yes.

Q. Is not that answer true?

A. Yes sir.

Q. Then you did report——

A. I reported to Richard Williams when I told him I was sick and wanted a lay-off this morning, particularly, the eighteenth.

Q. Did you report your injury?

A. No, sir; I told him I was sick.

Q. Then is or is not your answer to that interrogatory which was propounded to you in Salt Lake City, namely, "What was the name of the shift boss to whom you reported the injury," and you answered, "Richard Williams"—is that answer true or untrue?

Mr. Kearney: I object.

The Court: Objection overruled.

A. Yes, I reported. I reported to Williams that I was sick, and I wished to go home, but I would try to work if it was possible; that I didn't want to lay off. And he said "all right, try it." And I went up and stayed there until nine o'clock and went home.

Mr. Elliott:

Q. I will ask you if it is not a fact that in testifying in that deposition in Salt Lake City you did not state that you did report your injury to Richard Williams on the 18th of August, 1914, the day you quit working?

A. I don't remember it sir; I don't remember such.

Q. You may or may not have said it?

A. Well, I may or may not.

Q. If you said it was it true?

A. If I said it, it was all right.

Q. And it was true?

A. It is true if I said it, bit I don't think I said it; I am pretty sure.

Q. On page 28 of this deposition, the second question appearing upon that page: "What was the name of the shift boss to whom you reported your injury," and your answer to that as stated here is "Richard Williams." Is that answer true?

A. I guess it is. If it is there, it is all right. Of course, I wouldn't be positive. I suppose it is all right.

Q. Then which is true, you- statement in Salt Lake City that you

did report your injury to Richard Williams, your shift boss, on the 18th of August, 1914, or your statement made here today that you did not so report your injury?

A. I told you——

Mr. Kearney: I object to the form of the question as repetition and it has been answered several times.

The Court: Objection overruled. Answer.

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A. I told you that I reported that I was sick.

Mr. Elliott: I ask you which is true. Answer the question, please.

Mr. Kearney: Now, if the Court please, if it is true that he reported his injuries,—isn't that reporting his injuries if he is telling him he is sick?

The Court: That is a matter for argument.

Mr. Kearney: And then follow the witness up and ask him which is true and which is false. I don't think it is a proper method of cross examination.

The Court: Objection overruled. Now, you may explain to him what you mean by asking which is true.

Mr. Elliott: Which statement is true, the statement that you did report your injury or the statement that you did not report your injury to the shift boss?

Mr. Kearney: I object to that.

The Court: On the 18th day of August.

Mr. Elliott:

Q. On the 18th day of August, 1914, the day on which you say you quit work?

A. Well, if I said it, I have already said it, so there is nothing to it.

Q. You won't say which is true?

A. I will tell you, I don't remember such a business put to me right now. I am just telling you as a gentleman that I reported when I wanted to *ho him* this morning of the 18th that I was sick, that I wasn't well enough, or didn't feel well enough. And he says, "Well, go home." And then I told him that I would like to work and try myself, and I will go up, meaning I will go up to the tunnel. And he said "All right."

Q. Yes, you have gone all over that ground before. Then you remembered in Salt Lake City that you told your shift boss on the 18th day of August, 1914, that you had received an injury and today you don't remember that you told him that you had received an injury on that day?

A. Well, I can't say that I put it in that way.

Q. You don't remember it then.

The Court: No, he says he can't say that he put it in that way.

The Witness: My meaning is the same as I have just explained myself, that I went to him and reported.

The Court: No, he is asking you about what you testified in Salt Lake City.

The Witness: Yes, certainly, I understand.

Mr. Elliott:

Q. Did that rock knock you down.

A. Yes sir.

Q. Render you unconscious?

A. I turned around and I got dazed, and I don't know what you might call it.

39 Q. Did that rock knock you down, Mr. Bray?

A. Yes, I fell down, anyhow, I guess it knocked me down.

Q. Did it render you unconscious?

A. Yes sir.

Q. Did it cut your scalp?

A. Yes sir; in two places.

Q. Was there any blood from a scalp wound?

A. Yes sir; there was blood.

Q. Did Noah Green notice or make any remark about the presence of blood from that wound in your scalp?

Mr. Kearney: I object to that. There was nothing brought out on direct examination about that.

Mr. Elliott: He testified that Mr. Green was present there and saw the wound, the blood from the wound.

The Court: Yes, he also said that Mr. Green took hold of him. I think that is within the rule. Objection overruled.  
(Question read.)

A. Yes sir.

Mr. Elliott:

Q. What did he say about it?

A. He said it was cut, and when I was sitting down he stood in front of me and examined my head.

Q. He examined your head?

A. Yes sir.

Q. And said he saw the blood coming from the wound in your scalp?

A. And he wanted to take me right home, take me right out, and I said, "no, I will wait awhile. The shift is pretty near up." And I says, "I will sit here and rest."

Q. Did he want to take you to the hospital?

A. No, he wanted to take me home.

Q. How long were you unconscious?

A. Oh, I couldn't say. I couldn't say that; probably a few minutes, five or ten minutes, or five minutes. It might be less or more; I couldn't say. I was in a dazed condition.

Q. But you weren't down and out on the ground, unconscious from that blow?

A. Yes sir; I suppose I was. I didn't get any blow anywhere else.

Q. What was the weight of that rock? What was the size of that rock that struck you on the head?

A. Well, it is guessing with me, because I wasn't looking right at the rock when it fell. I was sideways, and I couldn't say. It is just merely a guess; that is all, on my part.

Q. Was it as big as your fist or as big as your head, or as big as one of those chairs there.

A. Well, I don't know. It might be bigger. It is only a guess.

Q. Now, I will ask you if it is not a fact that upon the taking of your deposition in Salt Lake City on the 4th of October, you testified that that rock was nine inches wide by about eighteen or twenty-four inches long—not specifying how thick it was—but stating that it weighed probably forty-five or fifty pounds.

A. Well, that was just through your talking; that is all. I don't know how big the rock was.

Q. How is it through my talking? You answered the question and you stated that.

40 A. Well, that is what I said. I don't know how big the rock is because I wasn't looking at it. When a man is sideways he can't tell how big that rock was. He ain't looking there. If I was, it would probably hit me in the face.

Q. I ask you now, and you can answer this question "yes" or "no."

A. Yes, I made that statement, yes, and it is only a guess at that.

Q. Is it true that that rock was that size, or is it not?

A. No, I don't say it is true, because I don't know. It is only a matter of guessing with me on the size of the rock.

Q. What was the nature of that injury that you have detailed here that you received when you were about sixteen years of age by falling down a ladderway, as I understand?

A. What was the nature?

Q. Yes.

A. Well, I just fell.

Q. How far did you fall?

A. Well, I couldn't tell now exactly.

Q. You fell, though?

A. What?

Q. Did you fall down or up?

A. I fell up, or down. I didn't fall up; that is a cinch.

Q. How far did you fall?

A. Oh, I couldn't say now—two or three ladders; I don't know just what distance.

Q. Two or three ladders?

A. Yes, short ladders.

Q. How long were the ladders?

A. Oh, I don't remember; probably five or six feet long. They might have been ten; I don't know. It is so long ago that I don't remember.

Q. How did you happen to fall?

A. I was packing a can of water and climbing with one hand.

- Q. Now, when you say you fell a distance of three ladders——  
 A. Well, three or four.  
 Q. —each ladder six feet long or more——  
 A. Well, something like that.  
 Q. —nine feet, eighteen feet, now is my talking compelling you to say that?  
 A. What?  
 Q. Is my talking getting you to say that you fell that distance?  
 A. No, I don't know how far I fell, I say.  
 Q. Where did you land? How did you fall; on what part of your body did you strike?  
 A. I lit on me feet and fell over.  
 Q. Fell over on your side?  
 A. Onto the right as near as I can tell. I can't tell that; it is so long ago. I was only a kid then.  
 Q. Did you strike your head?  
 A. No.  
 Q. What part of your body did you strike when you fell over?  
 A. Well, just with my arm, just on the sideways, as near as I can tell; I don't remember much about that. I couldn't be very much hurt when I walked four or five miles.  
 Q. Mr. Bray, how long have you been mining?  
 A. About thirty years, a little over, I guess; since I was fourteen.  
 Q. Where did you start in?  
 A. In England.  
 Q. In your experience in mining covering that period have you ever received any injuries at all to your head?  
 A. Well, not of any consequence. I wouldn't——  
 Q. You have received injuries to your head?  
 A. Well, I might have been touched, but I don't know as I have.  
 41 Q. How long were you in the hospital at Morenci?  
 A. About a week or ten days, I should judge.  
 Q. Do you know Doctor Goodrich of Morenci?  
 A. Yes.  
 Q. Doctor Goodrich examined your head?  
 A. I believe he did.  
 Q. Well, did he or didn't he?  
 A. Well, he did.  
 Q. Doctor Goodrich asked you how you got hurt?  
 Mr. Curley: I object to that, if your Honor please,—any communication——  
 Mr. Elliott: I assume he can answer how he got hurt. He can answer that "yes" or "no".  
 Mr. Curley: I object to any communication between the Doctor and the witness. Doctor Goodrich was waiting upon him at the time.  
 The Court: Because it is confidential?  
 Mr. Curley: Because it is confidential. If your Honor please, this question was up——

The Court: I am familiar with the law of the case, Mr. Curley. All I want to know is whether or not this physician was attending him at the time.

Mr. Curley: At the time. He was there for that purpose.

The Witness: Yes, I was paying a dollar, eighty-five a month for that treatment.

Mr. Curley: We object to any conversation or anything that occurred—anything that Mr. Bray said or anything that the Doctor said.

Mr. Elliott: The question, though, your Honor, is simply this: did the Doctor ask him such a thing.

The Court: Well, that is the very thing that a doctor does ask a man when he treats him. He first wants to know what the patient has to say about his condition, and then he proceeds in a professional way to make the examination. Now, all that occurred between the doctor and this witness was confidential, as I understand it, and on their objection will be excluded. I sustain the objection.

Mr. Elliott:

Q. How soon after your injury, Mr. Bray, you claimed injury—

A. What is that, sir?

Q. I say how soon after your claimed injury did this dizziness begin?

A. Well, as near as I could tell, about a few days after. It might have been a week. I wouldn't be positive. It wasn't long. It was a short period.

Q. As a matter of fact, didn't you state in taking your deposition in Salt Lake City that that dizziness began immediately at the time and after, following that injury; that when you regained consciousness you were dizzy, and you were dizzy from that time up to the time of your operation?

42 A. I was dizzy then, too. What I mean is when the thing started to work on me so that I couldn't get around to be able to walk. It was several days before I began to get in that condition, that I began to fall into the left hand—all the time fall into the left hand side.

Q. That is your explanation of it?

A. Yes, sir.

Q. Now, Mr. Bray, will you please show or demonstrate to the jury the point on your head where that rock hit you?

A. What part of the head?

Q. Yes.

A. Right there (indicating).

Q. The left-hand side of the head above the ear?

A. Right there, sir.

The Court: At that point there (indicating).

A. Yes.

Q. Is there any scar?

A. Well, I don't know. I can't see it myself.

Q. Where was the operation?

A. Right here (indicating).



Mr. Elliott:

Q. And at this point, on the left-hand side of your head right above your ear?

A. Right here (indicating).

Q. You were struck with this rock and that is where your scalp was cut?

A. Yes, right across here, in this direction, and down.

Q. The scalp was cut how far?

A. Oh, I couldn't tell you how far; I don't know that.

Q. But there was enough direction to that cut in your scalp so that you could say it was in this direction and then down?

A. Well, that is the operation you are talking about, ain't it?

Q. I am talking about the cut which you say you received on your scalp from the rock.

A. Oh, no—the cut—why, the cut was right there, (indicating). There was two—

Q. Two cuts?

A. Yes.

Q. And the blood flowing from them?

A. Yes, sir.

(Juror Haskins examined that portion of the plaintiff's head, indicated by him.)

Mr. McFarland: If the Court please, may the other jurors, if they like, examine Mr. Bray's head?

The Court: Oh, yes, anybody that desires to do so, may.

(Juror Dolan examined that portion of the plaintiff's head, indicated by him.)

Mr. McFarland: Is there any other juror who would like to examine Mr. Brady's head?

The Court: Proceed.

Mr. Elliott: You stated, Mr. Brady, on your direct examination—

The Court: I cannot hear you, Mr. Elliott.

Mr. Elliott:

Q. You stated, Mr. Brady, on your direct examination, I believe, that you had worked at the city park in Salt Lake City over two different periods, and at the end of the first period you were  
43 laid off.

A. Yes.

Q. With a gang of men?

A. Yes.

Q. Now were you fired the second time you went back to work, or did you lay off?

A. We were all fired.

Q. You were all fired?

A. Yes.

Q. You weren't singled out on account of any incapacity?

A. Well, I couldn't say.

Q. You were all fired together?

A. I don't know about that. I am not able to state that question,—or that answer, rather.

Q. I am asking you if you were.

A. I couldn't say.

Q. I am asking you is you were singled out and discharged or whether you were turned loose with a number of other persons working at the park?

A. There were several others.

Q. Several others turned loose?

A. Yes.

Q. How much were you making a day up there?

A. Two and one-quarter.

Q. Now, you have stated that your expenses from Morenci to Salt Lake City were in the neighborhood of \$150.

A. Yes, somewhere.

Q. Did that include your wife's expenses also?

A. Yes sir.

Q. She went with you?

A. Yes and family.

Q. Now was any part of that \$150 paid out of your own private pocket?

Mr. Curley: I object to that if your Honor please. Upon motion awhile ago the answer was stricken out as to where the money came from. I don't imagine that is material, where it came from.

The Court: Well, that portion that was paid for his own expenses is material, but what was paid, what amount was paid for his wife and his family, as he testified, I think is immaterial.

Mr. Curley: Yes, but that isn't the question. The question here is what part of that was paid out of your own pocket. Mr. Bray testified awhile ago that he got certain of this money that he had spent on this trip from certain orders, and upon motion that was stricken out. In view of that ruling I think it would be improper to ask him at this time what portion was paid from his own pocket.

Mr. Elliott: The purpose of that is that he stated that certain of this money that he had came from these lodges, and we asked that that be stricken out, and the court granted our request. Now there may be other of that money which he says he expended on his expenses to Salt Lake City, and we would like to know if any of that is chargeable from his own pocket, whether he had to put it up, or whether it was given to him by somebody.

The Court: It does not make any difference, as I take it, whether the lodge gave it to him or whether it was individual money. If he spent that much money on the trip, and the jury come to the conclusion that that trip was a necessary one, would it not be recoverable?

44 Mr. Elliott: I should think not, your Honor.

The Court: If he sustained injuries and the company is liable? Of course, the question of the company's liability is yet to be determined. But should the jury find that the company is liable and that the accident was not due to his own negligence, then the question of compensation arises, and if any lodge furnished the money

which he used in the payment of medical bills, doctor's bills, or any necessary expense, then I think he should recover that just as much as he might recover it if he had paid it out of his own pocket. I do not know of any rule of law to the contrary, and with the light which I now have on the subject, I shall so charge the jury. It will be necessary for him to state what amount was paid for himself and what amount was paid for his family, because the entire \$150, so the witness testifies, was used in payment of his expenses and those of his wife and family. Now what he paid for the expense of his wife and family is not recoverable. If the company is liable for anything at all, it is not liable for that.

Mr. Curley: We will agree upon that.

Mr. Elliott:

Q. Mr. Bray, will you describe your condition at the present time in respect to being better or worse than it was at the time you were working at the city park in Salt Lake City.

A. Well, I am just about the same. Sometimes I feel pretty fair, and then ag-in I fall away. I ain't very good.

Q. What do you say with respect to your ability to take long walks?

A. Well, if you would give me time, I might walk from here to Morenci.

Q. You could do that, could you?

A. Well, I don't know as I could, but if I had time——

Q. You could do it?

A. Probably it would take me two or three months.

Q. Did you have any difficulty in navigating about the crowded streets of the City of Salt Lake?

A. Just the same as I told you before, about in the mornings. I am worse in the morning when I get up out of bed than I am any other part of the day. There seems to be something in me system that is pulling me back. Sometimes I walk fine. Other times, again, I am not so good,

Q. How is your weight at the present time; how does it compare with your weight as you would put it normally?

A. Well, when I was hurt, up to that time I weighed 167 pounds, 168, and today I am 153, '3 or '4; probably 155.

Q. Did you get weighed?

A. No sir.

Q. When did you weigh last?

A. Why, I weighed here a day or two ago.

Q. Have you had any epileptic tendencies develop in you as yet; that is, any fits?

A. Fits?

Q. Yes.

A. No, I don't think I have got any fits. I hope not.

Q. You never have had any fits?

A. I hope not.

Mr. Elliott: That is all.

45 Redirect examination.

By Mr. Kearney:

Q. At the time this rock fell on your head, were you wearing a hat?

A. How is that?

Q. At the time this rock fell on your head, were you wearing a hat?

A. Yes sir.

Q. How was your hair then, short or long?

A. It was long.

Q. In that operation was the skin on your head cut and laid back?

A. Yes, the scalp was all cut back here, turned over.

Mr. Elliott: I move the court to strike out that answer. I rather suspect the witness here was under the influence of an anesthetic at the time that operation was performed.

The Court: I cannot hear you.

Mr. Elliott: I say I move to strike out the witness's description about how his scalp was cut back at the time of his operation, because I rather suspect he was under the influence of an anesthetic.

The Court: Well, I suppose the witness knows what he is talking about. If you don't know of your own knowledge, don't state it.

The Witness: Of course, the doctor told me.

The Court: Well, don't tell what the doctor told you. You are testifying now. Tell matters that are within your own knowledge.

The Witness: I don't know it myself positive.

The Court: Very well, answer it that way.

The Witness: That is what I say.

Mr. Kearney:

Q. State whether or not you experienced any particular headache.

A. Headache.

Q. Yes.

A. No, not particularly.

Q. Was it mostly in the form of dizziness?

A. Yes.

Q. Staggering?

A. Yes sir.

Juror Moore: What was the question, please, prior to this last one. I did not hear it.

The Court: Whether he experienced any headaches.

Juror Moore: Headaches?

The Court: Yes.

Mr. Curley: He said "no."

Juror Anderson: One question, if your Honor please, that hasn't been brought out.

46 Q. How far did this rock fall from the top of this tunnel before it struck you?

A. Well, it didn't—it didn't fall from the top. As I showed you just now, it fell off of the side, and close to the roof, as near as I can tell. I couldn't tell within a few inches. Probably it might have been three feet; it might have been four. It might have been more or less; I couldn't say positive.

Mr. Kearney: That is all.

The Court:

Q. How near were you to the side of the tunnel when the rock struck you?

A. Right close, sir; right close to the side.

Q. Did you not look to see where the rock had fallen from?

A. Why, I didn't have no chance to look sir.

Q. Were there other rocks along there on the floor?

A. Yes sir.

Q. Of the tunnel?

A. Yes, I was standing on loose dirt.

Q. Loose dirt?

A. Yes, I was on the rill of the pile, you see.

Q. You say you were unconscious a few minutes?

A. Yes.

Q. Well, then, did you go back to look, to see what had struck you?

A. No sir; no sir.

A. Why didn't you?

A. I knew what struck me all right.

Q. Did you look to see what the size of the rock was?

A. No, it broke up, all broke up. It was a kind of soft, porphyry nature of ground. It broke.

Q. When it struck the ground did it go to pieces?

A. Yes sir.

Q. Could you estimate how far from the surface of the tunnel the rock came?

A. Well, I am just saying, I should judge, it probably three or four feet.

Q. How high was the tunnel from the top of your head?

A. Well, when I was on the rill of the pile, that is just about the distance, three or four feet high. It might have been an inch or two more or less. I couldn't tell exactly because I never measured it.

Q. Well, then, how could the rock fall from the side?

A. Well, you see, it fell from the side of the drift.

Q. What were you doing at the time?

A. I was just quitting; just through with my shift's work.

Q. Were you standing up within two or three feet from the side of the tunnel?

A. Yes, two or three feet off of the level. I would like to explain it to you. You see, this here (indicating) is the side of the tunnel, this board. I am standing like this here is right now, and I gets around, and turned around to the left, you see, and gets on the rill of the pile going toward the outside, and this rock fell from up in this direction, on the side and up, you know. See?

Q. Had you been working up there?

A. Working right in this roof, changing the timbers.

The Court: That is all. Call your next witness.

47 Mr. Elliott: May I be permitted to ask the witness a question?

Q. I will ask you, as a matter of fact, if you did not state at the taking of this deposition in Salt Lake City that that rock fell a distance of four or five feet and struck you on the head?

A. Yes, it might be that, the same as I say now. I can't tell within an inch or two.

Q. I will ask you if you did not so state. Answer that "yes" or "no."

The Court: He said he did.

The Witness: Yes, I did, yes, certainly. That is all right.

Mr. Elliott:

Q. I will ask you further if at Salt Lake City at the taking of this deposition you weren't asked how large was this rock that hit you, and if you did not reply, "well probably eighteen inches or two feet long, and probably eight or nine inches thick. It was quite a rock. You may know, a man the way I was standing, my eyes might deceive me. It might be bigger; it might be smaller." "What was the approximate weight of that rock, forty-five or fifty pounds, nine inches by eighteen inches?" Well, it must have been that, forty or fifty pounds; somewhere around there."

A. Well, it is just the same as I tell you now; I can't tell.

Q. Now, you said here that that rock was broken to pieces when it hit your head. How did you make such an estimate as that in Salt Lake?

A. When it fell on the ground, I can't tell because I wasn't looking at it. I don't know what size it was.

Mr. Elliott: That is all.

Juror Haskins:

Q. Could you tell whether there was more than one rock fell at that time?

A. Yes, there was more than one.

Q. Quite a lot of stuff came down?

A. Yes, quite a bit.

Q. You don't know which rock hit you or whether it was a number of rocks?

A. No, I know there was quite a bit of dirt fell there. I don't know which rock hit me, or nothing at all. I knew that I was hit and that is all.

The Court: That is all.

Mr. Kearney: That is all.

Mr. Curley: Gentlemen of the jury, I will not read to you the deposition of Doctor E. F. Root.

The Court: How long is that deposition?

Mr. Curley: Why, it extends from page 43 to page 91.

The Court: Are there any objections to the questions and answers?

Mr. Elliott: There are a few objections interspersed through it, your Honor. There are not many.

The Court: Very well, read for half an hour.

Mr. Curley (reading): Doctor E. F. Root, a witness produced on behalf of the plaintiff, being first duly sworn testified as follows:"

\* \* \* \* \*

(Q. Did you receive any communication from a Doctor Goodrich of Morenci, Arizona, concerning him about the time you called on him, or before, or immediately after?)

Mr. Elliott: That objection is withdrawn there. We admit in that connection that he had a letter from Doctor Goodrich.

Mr. Curley: That is immaterial, anyway.

Mr. Elliott: That is immaterial.

("Q. What, if any, other doctor did you call to consult with you concerning Mr. Bray? \* \* \*

Q. Now, what conclusion did you and Doctor Ewing reach, assuming that you reached some conclusion, as to the nature of his ailment, and the remedy for it?")

Mr. Elliott: I object to anything that Doctor Brown said, if your honor please, in the absence of the defendant.

The Court: Doctor Brown?

Mr. Elliott: I think his name is "Brown".

The Court: "Ewing".

Mr. Curley: He goes on to say that "we reached" a certain conclusion. There was no objection interposed to this at the hearing.

The Court: Well, they may object now. I do not see how it can well be separated. I think the objection is a good one, that one doctor may not quote another doctor, or may not tell at what conclusion the other doctor arrived, but the question is how it can be separated.

Mr. Curley: He couldn't state what conclusion that Doctor Ewing stated here, without separating it from the conclusion that Doctor Ewing arrived at.

The Court: Well, would it not be your business to separate it so that the statement of the conclusion of your doctor would be competent?

Mr. Curley: Well, that is Doctor Root's conclusion.

The Court: Well, it will be admitted simply as the conclusion of Doctor Root, and his statement with reference to any conclusion that Doctor Ewing reached will be excluded.

Mr. Curley: We have no objection to that, your Honor.

The Court: Instead of reading "we", read "I".

Mr. Curley: The answer then would be, "I concluded that there was a great deal of pressure on the brain, bringing about these symptoms, and that it was either a tumor or abscess, with a very strong



probability of abscess. My conclusion was that the pressure was in or about the cerebellum, the lower part of the base of the brain."

\* \* \* \* \*

("Q. You may state what in your judgment was the cause of the man's nervous disorder and his inability to walk?

A. Why, I attributed his inability to work entirely to the pressure on the cerebellum.")

The Court: "To work," or "to walk"?

Mr. Curley: The question was his inability to walk, and the answer is—I don't know whether the stenographer made a mistake in that or not, but the answer is "Why, I attributed his inability to work entirely to the pressure on the cerebellum."

("Q. What would you expect the result to be, or how would he be effected if he should undertake to do the work of the average—the average work of the average miner; that is in what would his failure to do that work first manifest itself?")

Mr. Elliott: We renew our objection there on the ground that the doctor has not qualified, as to mining work. He has no knowledge of mining conditions at all.

Mr. Curley: Mr. Sullivan says, "Will you change the word "miner" to "laborer" and in that way avoid the objection. And then Mr. Elliott says, "I will renew the objection."

The Court: Objection overruled.

Mr. Curley (reading): (A. Well, in the first place, after a severe illness and injury and operation there is so much weakening—letting down of the whole tissue, that I wouldn't expect him to be able to do that heavy work. \* \* \* I mean the possible re-forming of an abscess."

\* \* \* \* \*

"Q. I want you to state, Doctor, whether or not you have ever received any compensation for your services in this matter.")

Mr. Elliott: The objection is withdrawn.

Mr. Curley (reading): (Q. "Then, will you confine your answer to your services, and Doctor Evans and Doctor Galligan.")

50 Mr. McFarland: If the Court please, that is immaterial what other doctors would charge, and what they would do in such a situation.

The Court: That question is not answered.

Mr. Curley: The next question is, "I will withdraw that question and ask this question: What would you say is the reasonable value of the services rendered the patient by you and your associate doctors?"

Mr. McFarland: I object to associated, unless he knows.

Mr. Curley: That is the value of the services.

The Court: Well, if the plaintiff has not expended or contracted to expend any money, it could not be recovered; it would not be material in the case. If the doctor did not charge anything for it, you cannot allow anything for it. Without some proof that a charge was made or a liability incurred, that would be immaterial.

Mr. Kearney: I think it was the intent to state what the services rendered to him were reasonably worth.



The Court: It doesn't make any difference; if they were gratuitous, they cannot be recovered. You cannot recover something for the physician of the Order, who was doing him a kindness.

Mr. Elliott: There is no evidence here that there was any charge made.

The Court: The reason I admitted the other testimony, the testimony with reference to the amount expended, was upon the theory that the lodge gave it to the man, and the man spent it. It doesn't make any difference how he got it. If it was a gift, it was his just the same.

Mr. Curley: I understand your Honor's position.

(Q. Are you sufficiently familiar with the rules and regulations of the Holy Cross Hospital concerning its charges to enable you to state what is usual charges would be, and what would be the usual value of its services in caring for Mr. Bray for a period of two weeks, including the operation?" )

Mr. McFarland: I object to that.

The Court: Same ruling.

Mr. Curley (reading). (A. Yes I am.

Q. Now, you may state what is services are worth." )

Mr. McFarland: Same objection.

The Court: Same ruling.

Mr. Curley (reading): (A. Twenty-five dollars. This was a ward case.

Q. You mean \$25 a week?

51 (A. No, \$25 altogether; \$10 a week and \$5 for the operation." )

The Court: We will suspend here, gentlemen of the jury, you will not discuss this case among yourselves nor read any newspaper accounts of the trial. Report tomorrow morning at half-past nine.

FRIDAY, Dec. 3rd, 1915—9:30 a. m.

The Court: Proceed:

Mr. Elliott: If the Court please, in this deposition, as to the cross examination of the plaintiff's witness, Doctor Root, the defendant at this time wishes to withdraw the questions appearing on his cross examination from the beginning of the cross examination on page 56 to the top of page 60. I believe there is no objection to that on the part of the plaintiff. The reason for the withdrawal is that all the questions are based upon facts that we thought had been developed in the cross examination of Mr. Bray in his deposition, but which have not been developed here at the trial, and it will be taking up the time of the court to consider the objections.

The Court: Very well, proceed.

Mr. Elliot: I now read you, gentlemen, the cross examination of Doctor Root, the direct examination of which was read to you at the conclusion yesterday afternoon.

(Reading:) (Q. Now, will you state what character of abscess you found in your operation? \* \* \*

Q. I quote you from Osler's system, page 385, in which this statement is credited to Gower—)

Mr. Curley: I object to that statement. On his cross-examination he is reading from a medical book, and I think under the rules that is not permissible.

Mr. Elliott: He has stated his general opinion, and then fortifies that by a reference to a standard medical work.

Mr. Curley: That isn't it. The attorney is asking him, "I read you from Osler," page so-and-so. That isn't a case of fortifying his opinion. He is asking him if that is an authoritative statement.

The Court: If the book itself would not be admissible would it not be doing indirectly what you may not do directly, to permit that to be read into the record? Do you insist that that is competent?

Mr. Elliott: I don't understand you, your Honor.

The Court: Do you still insist that that is competent?

52 Mr. McFarland: If your Honor please, I think it is perfectly proper to call the witness's attention to a statement of an author, and ask him if that is true, is that ordinarily true. I do not think that there can be any question about quoting the statement of an author as to conditions and results. That is the way they all get their information. The author lays down a certain principle, and the fact that an excerpt is read from that author I think is one of the best evidences of fact that the proposition is true, whether it is true or false.

The Court: It is a pretty close question. Now, there was a question asked in the trial of the case the other day. You asked the witness whether or not he would regard such an author's opinion as very high authority.

Mr. Curley: Yes, that was on cross examination. The witness had made the broad statement that in recent years some authors had taken the stand that there was no connection, and upon cross examination I asked him, "Do you know the standing of Doctor Osler?" He said, "I do." "What is his standing?" "What is his standing in the medical profession?" "He stands at the head of his profession." "Doesn't he say—" That was on his cross examination, following his statements that such a contention had to a certain extent been abandoned by the men of the profession. Now this Doctor might never have had a case of this character. He may testify entirely from his learning from the books, and when they ask him, "Upon what do you base this; do you base it upon your experience?" He may say "No, I base it on my learning from the books." Then he may state to him what the author says, but he cannot read to him out of the book and say, "Do you agree with that?" I think there is not doubt that the great weight of authority is that you cannot read from a book and ask him if he agrees with that. That is but an indirect manner of introducing the unverified and uncorroborated testimony of authors without the opportunity of cross examination.

The Court: Well, as I understand it, they are not by that question seeking to introduce the book in evidence, and it is not the opinion of the author that is called for. It is the statement of a witness that a statement which has been made by an author is in his judgment correct. Now it may be an indirect way of offering or asking

for testimony which is not competent, but I will reserve my ruling on that question. You may omit that question and answer for the present, and I will give you gentlemen an opportunity to look into the question.

Mr. Curley: As far as this particular question is concerned I don't care anything about it, but I don't know what may come up later on. There may be something else come up that I do care about.

The Court: Well, I am in doubt about it myself. I know that it is not proper to introduce medical books, or any excerpts from medical books, in evidence, and if I were to admit it I would not admit it as the opinion of the author of that book at all but merely as the opinion of the witness expressed in the language used by that author. However, I will reserve my ruling on the question and give you gentlemen an opportunity to look into it. Proceed with the reading.

53 Mr. Elliott: you stood in — Osler in the other case and repudiate him in this case.

Mr. Curley: No, I don't repudiate him at all. I simply object to your reading from him.

Mr. Elliott (reading): ("Does traumatism produce diseases of the brain, the cerebrum?")

The Court: You had better explain what you mean by "traumatism" to the jurors, so that they will understand as you go along.

Mr. Elliott: A traumatism, as I understand it, gentlemen, is an injury produced by force——

The Court: A blow.

Mr. Elliott: — a blow, externally, one which comes from without, and I think is a term which is generally applied, by the medical profession, to the character of injuries which arise in industry.

(Reading:) ("A. I think primarily by weakening the tissues to such an extent that they are not able to resist or withstand the infection." \* \* \*)

"Q. I will give you a statement taken from Rose & Corless on Surgery, at page 787, as follows: 'Sometimes it (meaning the brain abscess) occurs apart from penetration, and then one can only suppose that it is due to auto-infection of the contused or lacerated area.' Does that statement explain my preceding question more fully?")

Mr. Curley: I object to the question for the same reason given in my objection to a previous question of this kind.

The Court: The ruling will be reserved.

Mr. Elliott: Would you admit the question, your Honor, for the purpose of explaining my former question?

The Court: Please mark those questions with a cross-mark to the left. You may call my attention to them again before the close of the testimony.

Mr. Elliott: We will follow down to the last question at the bottom of page 63½, the question being:

(Reading:) ("Q. In this case we are speaking of traumatic abscess entirely. We will take it for granted that it is authoritative enough.")

Mr. Curley: That follows the other. We object to that because it is based on the reading of the other portion from Rose & Corless.

Mr. Elliott (reading): ("Q. In what regions of the brain do abscesses occur with the greatest frequency? \* \* \*

54 Q. Then you support this statement from Osler's System at page 384, that "the history of trauma is often dubious of interpretation."?)

Mr. Curley: The same objection.

The Court: You may pass it.

Mr. Elliott (reading): ("Q. Basing your answer on your experience as a physician and surgeon \* \* \* to determine the cause for continued dizziness?")

Mr. Curley: I object to that. No, I will withdraw that objection.

Mr. Elliott (reading): ("Q. From your experience as a physician and surgeon, would you believe it unreasonable to deny it at such time?")

Mr. Curley: That objection is withdrawn.

Mr. Elliott: I will withdraw the next question.

(Reading:) ("Q. Would it be possible that a person who has developed brain abscess \* \* \* determine exactly which injury produced the abscess?")

("Q. Now, Doctor, if Richard Bray, the plaintiff, in this case, had come to you first complaining of dizziness, and in examining him and questioning him, you asked him if he had received a head injury, and he denied having received a head injury, would you still have attributed the abscess to traumatic origin, or to external injury of the head?")

Mr. Curley: I object to that as not proper cross examination. There has not been any such evidence introduced upon direct examination.

The Court: Objection overruled.

Mr. Curley: If your Honor please, there is no evidence that there was any denial upon his part.

The Court: I understand. Objection overruled.

Mr. Elliott (reading): ("A. We must have a history of trauma, or evidence of trauma in some way in order to believe that it is traumatic.

Q. If a patient came to you having ear symptoms of an indefinite nature, complaining of dizziness and localized tenderness back of one of the ears, and you removed wax from that ear which caused the patient immediate temporary relief and benefit, and later an abscess of the cerebrum occurred on that side, without other apparent causes of the abscess, would you be certain that the abscess was not due to ear trouble?")

Mr. Curley: I object as not proper cross examination; not being based on anything brought out in the examination in chief.

55 The Court: Objection overruled.

Mr. Elliott (reading): ("A. I would not."

"Q. Is there such a disease as tuberculosis of the brain?" \* \* \*

"A. Well, pain, loss of mentality.")

I think that that is wrong. It should be mobility. It does not make sense. It is an error in transcription.

Mr. Curley: Well, if that is his answer, the only thing I know to do is to read it.

The Court: It could not have been, from the very nature of things, a complete lack of mentality. He couldn't have given the information which would have enabled the physician to diagnose his case properly.

Mr. Curley: I think myself that is probably what he meant. I wasn't present at the examination.

The Court: Do you gentlemen desire it to stand as it is, or to change it?

Mr. Curley: We will change it.

Mr. Elliott: I was suggesting it in all fairness, because I was present at the examination. I have a positive recollection of it.

The Court: You may change it.

Mr. Curley: Go ahead and change it. What word did you use?

Mr. Elliott: "Mobility." (Reading:) ("A. Well, pain, loss of mobility, the chief symptoms we have from pressure; that is, focal symptoms from pressure.

Q. You were present, Doctor, during the examination of Mr. Bray, and is not his memory remarkable in the recitation of where he worked and how long he worked in each place?")

Mr. Curley: We object to that as not a proper hypothetical question; it being a question to be determined by the jury; not proper cross examination.

The Court: Objection overruled.

Mr. Elliott (reading): ("A. Yes.")

The Court: You will remember that this witness stated that one of the symptoms of an abscess was want of the ordinary mentality, lack of—

Mr. Elliott: —co-ordination of ideas and movement.

The Court: Yes, to express it technically; that is what he said.

The objection is overruled.

56 Mr. Elliott: The next question is withdrawn. I will withdraw down to the conclusion of the cross examination.

Mr. Curley: I will now read the redirect examination. (Reading.)

Mr. Elliott: Recross-examination. (Reading.)

Mr. Curley: I will next read the deposition of Dr. Brown Ewing. (Reading.) ("Dr. Brown Ewing, a witness produced on behalf of the plaintiff, being first duly sworn, testified as follows: \* \* \*

Q. You may state in what respects the patient in your judgment will not recover the full use of his limbs and be able to do hard manual labor.")

Mr. Elliott: I object to this question, your Honor, on the ground that it is leading and suggestive. The doctor has never stated prior to this point in the evidence any probable effect on the plaintiff's legs.

The Court: What is the ground of the objection you made at the time?

Mr. Elliott: That it is suggestive and leading. The doctor has

stated generally the probable future results to the brain, and not mentioned any probable impairment of the locomotive power of his limbs.

The Court: Objection overruled.

Mr. Curley (reading): ("A. What I would expect to find there would be the continuation of the spastic condition of the muscles of the lower extremities and a liability to inflamed condition of the scar at the seat of the injury in the brain.

Q. You may state, Doctor, what was the usual value of your services rendered the patient during the year 1914.")

Mr. McFarland: We will object to that.

The Court: Objection sustained.

Mr. Curley (reading): ("Q. Dr. Ewing, I will ask you to state what was the nature of the causes of this abscess from the examination you made of the patient. \* \* \*

A. No.")

Mr. Elliott: Cross examination. (Reading):

("Q. Dr. Ewing, you testified, did you not \* \* \*

Mr. Sullivan: That is all."

Mr. Curley: I will read the deposition of Dr. J. O. Evans. (Reading:): ("Dr. J. O. Evans, a witness produced on behalf of the plaintiff, being duly sworn, testified as follows: \* \* \*

Q. Were you associated with him as a partner?

A. I was.

Q. For how long?")

Mr. McFarland: If the Court please, we think that is wholly immaterial, as to his association with another physician, 57 or his work with him. That is not expert testimony.

Mr. Curley: It is only a matter of qualifying him as to his experience.

The Court: Objection sustained.

Mr. Curley (reading): ("Q. Are you acquainted with the plaintiff, Richard Bray, the gentleman who testified yesterday, and who sits here? \* \* \*

A. With only what I was told by Doctor Root at the time of the examination.")

Mr. Elliott: Cross examination of Doctor Evans. (Reading): ("Q. At the time that the operation was performed and you were present, did you observe any scars on the scalp over the supposed injured area? \* \* \*

A. Because I was under the sheet part of the time.")

Mr. Curley: Redirect examination. (Reading): ("Q. Did I understand you to say that you were under a sheet part of the time? \* \* \*

A. Yes.")

Mr. Curley: Deposition of John J. Galligan. (Reading): ("Dr. John J. Galligan, being first duly sworn, testified as follows: \* \* \*

A. He was Doctor Root's patient.")

Mr. Elliott: Cross examination. (Reading): ("Q. You have

stated, Doctor, that the examination was for the purpose of going in upon a tumor or abscess of the brain. \* \* \*

A. I couldn't state definitely. Doctor Root made the diagnosis.")

The Court: Call you- next witness.

Mr. Kearney: If the Court please, at this time we will read to the jury the expectancy of the life of the plaintiff from the American Life Tables.

Mr. McFarland: If the Court please, it will be consented that the Court will charge the jury as to the expectancy of life of Mr. Bray.

The Court: The expectancy is 21.6, is it?

Mr. Kearney: —.6.

The Court: Very well.

Mr. Kearney: And at this time I reoffer the certificate of citizenship of the plaintiff.

Mr. McFarland: If the Court please, we have admitted that he is a citizen.

Mr. Kearney: And I ask that it be marked and filed in the case.

58 The Court: Objection sustained.

Mr. Kearney: Then I will ask to have it marked and filed.

The Court: It may be marked for identification.

Mr. Kearney: Let it be marked for identification as Plaintiff's Exhibit A.

The Court: Very well.

Mr. Kearney: I offer it in evidence on the part of the plaintiff as proof of his citizenship.

The Court: The objection to *ist* admission is sustained, because the defendant does not deny that he is a citizen of the United States, but expressly admits it in its answer.

Mr. Kearney: There is one phase of the testimony it is intended to offset. I don't know whether the Court got it or not. Counsel for the defendant asked him where he was born. He says he was born in England, and the defendant corporation in this case is an alien. An alien cannot maintain a suit against an alien in the Federal Court.

The Court: I understand, but they admit in their pleadings that he is a citizen—

Mr. McFarland: Citizen of Arizona.

The Court: —of Arizona. They are bound by that. They cannot withdraw that without amending their answer.

Mr. Kearney: Out of an abundance of caution, I offer it.

The Court: It isn't necessary, and for that reason I sustain the objection.



MEADE CLYNE, M. D. called as a witness on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

Direct examination:

By Mr. Curley:

Q. You may state your name.

A. Meade Clyne.

Q. Where do you live, Doctor?

A. Tucson, Arizona.

Q. You may state your business or profession.

A. Physician and surgeon.

Mr. Curley: Do you now admit the qualifications of the Doctor to testify as an expert?

Mr. Elliott: Yes.

Mr. Curley: It is stipulated that the Doctor is qualified to testify.

Q. Do you know the plaintiff, Richard Bray, Doctor?

A. Yes, sir.

59 Q. Have you made any physical examination of Mr. Bray within the last week or such a matter?

A. Yes sir.

Q. State of what that examination consisted and what you found?

(Witness consults memoranda.)

A. The examination was made on the 22nd. The general condition was fairly good. His gait was rather unsteady.

Q. Speak loud enough so that the jury can hear you, Doctor.

A. His general condition was fairly good; his gait was unsteady. His heart and lungs were normal; blood pressure normal; reflexes slightly exaggerated. I found a depression which apparently was an opening in the skull, an inch and a half in diameter, about two inches behind the left ear and slightly above, slightly above the ear.

Q. Assuming, Doctor, that a man working in a tunnel, in a mine, is struck on the head by a falling stone with sufficient force, and of sufficient size to knock him down and stun him for some five, ten, or fifteen minutes, but from which he recovers and experiences no further inconvenience other than the natural soreness resulting from such a blow, for four or five days, or possibly a week, thereafter; and assuming that in about four or five days, or possibly a week thereafter he begins to experience dizziness when walking, and staggering unsteadily, which condition continues to grow gradually worse for approximately two weeks, when he is unable to longer continue work on account of such condition; and assuming that in about five or six weeks thereafter he is operated upon for an abscess of the brain, and the abscess located and opened within a short distance, say, three or four inches of the place of injury; that he had theretofore been in good health and had not within several years prior to such injury experienced any other injury or illness of any character, to his knowledge; what in your opinion would have been the cause of such abscess?



Mr. Elliott: I object to that question on the ground it assumes facts which are not exactly in evidence in this case. In the first place, it assumes the fact that Bray was stunned for five or six minutes. Bray's testimony in that respect is that he was knocked down and rendered unconscious. Now, there is a difference between unconsciousness and a stunned condition. And the second ground of the objection is that this question assumes that he had received no prior injury and had had no prior illness. Now Mr. Bray has testified here that he did have an injury—a rather serious one—at the time he was sixteen years of age, by falling down a ladder, and he also admitted on cross-examination that very likely he had received a number of injuries to his head and to his body while he was working as a miner during a period of thirty-eight years. Upon those grounds we object, because the question does not assume the facts that are in evidence here before the Court and the jury.

The Court: Well, as I remember the testimony, the witness state—I mean, as I remember the hypothetical question, it assumes that prior to that time he was in good health—good mental and physical condition.

Mr. Curley: Assuming that he had theretofore been in good health and had not within several years prior to such injury  
60 experience any other injury or illness.

The Court: The objection is overruled.

Mr. Elliott: Exception.

A. The cause would most probably have been the injury that he received.

Mr. Curley:

Q. If there had been no litigation pending Doctor, and you had been called upon to make an examination of Mr. Bray, and that state of facts had developed, would there have been any doubt in your mind as a physician as to the cause of the abscess?

Mr. Elliott: We object to that question.

The Court: I will sustain the objection.

Mr. Curley:

Q. You said, Doctor, that under that set of facts that it would be your opinion that the abscess would have been caused by the stroke on the head.

Mr. Elliott: I object to that question.

The Court: The Doctor has said that most probably it would have.

Mr. Curley:

Q. State whether or not, doctor, a stroke on the head would necessarily have to cause an abrasion on the scalp sufficiently to leave a permanent scar in order to produce an abscess of the brain.

Mr. Elliott: I object to that question, your Honor, unless for the purpose of this case counsel for the plaintiff incorporate in his question the character of the blow which is in evidence before the jury.

The Court: I think that objection is a good one.

Mr. Curley:

Q. There have been questions asked here as to whether or not there was a scar on Mr. Bray's scalp. Now I will ask you whether or not the blow would have to be of such a character as to leave a permanent scar in order to produce an abscess of the brain.

Mr. Elliott: Suppose it was a pillow or a sand-bag or an ax that had hit him. I can't see how he can answer that.

(Question read.)

The Court: I sustain the objection to that question as put to the witness.

Mr. Curley:

Q. State whether or not, Doctor, a stroke on the head, or a lick on the head by a falling stone would necessarily have to cause or leave an abrasion of the scalp—

Mr. Elliott: We make the same objection.

61 Mr. Curley: —or produce a permanent scar in order for the stroke or the lick upon the head to have caused or resulted in an abscess of the brain?

Mr. Elliott: The same objection, your Honor. The weight of the rock is not specified and the direction of the blow, or the distance through which that rock fell, showing the force and the momentum it might have got at the time it hit him.

Mr. Curley: It is a question of whether or not it hit him with sufficient force. Mr. Bray does not know the weight of the rock. He doesn't know the size of the rock. He doesn't know probably within a foot of where it fell. The question is whether a lick of that character could have resulted without leaving a permanent scar on his scalp.

The Court: You mean to ask the witness, I presume, whether or not an abscess of the brain could have been caused by a blow made by a falling rock striking the side of the head, without such a blow leaving a scar on the side of the head.

Mr. Curley: And it would be a blow of such a character as would produce an abscess of the brain. Of course, you might have a little blow on the head that would not result in anything.

The Court: Well, I will permit you to ask a question based upon the testimony in this case—a hypothetical question based upon the testimony in this case. I think you can frame such a question,—

Mr. Curley: Well, I was trying to keep within that rule.

The Court: —and at the same time keep within the record. I do not hold that the testimony which you call for may not be admitted, but I sustain the objection because your hypothetical question is not based upon the testimony in the cause.

Mr. Curley:

Q. Assuming, Doctor, that a man working in a tunnel in a mine is struck on the head by a falling stone with sufficient force to knock

him down and stun him for some five, ten, or fifteen minutes, but from which he recovers and experiences no further inconvenience other than the natural soreness resulting from such a blow, for four or five days, or probably a week; and assuming that in about four or five days, or probably a week thereafter he begins to experience dizziness when walking, and staggering unsteadily, which condition continues to grow gradually worse for approximately two weeks, when he is unable to longer continue work on account of such condition; and assuming that in about five or six weeks thereafter he is operated upon for an abscess of the brain and an abscess is located and opened within a short distance, say, three or four inches of the place of injury; in your opinion would it have been necessary that the stroke upon the head that I have just mentioned should have left a permanent scar upon the scalp in order to have been of such character or such force as to have resulted in or produced the abscess that I have just mentioned?

62 Mr. Elliott: Is that all of the question?

Mr. Curley: That is all of the question.

Mr. Elliott: We object on the same ground, your Honor. It is still too general. We have a question setting forth the falling of a rock and striking the man and stunning him. Now we haven't been told the weight of the rock. Stunning of a man is a very relative term, and we ought to have the weight of the rock or the distance it fell, or when it struck him. We have rather positive evidence here as to what Mr. Bray thought that rock weighed, and we have absolute evidence of how far it fell, and we have positive evidence of the date that rock hit him. And the evidence is not that Bray was stunned but that he was knocked down and rendered unconscious, and the use of the word "stunned" I think is using a word that is not in evidence, because there is a vast difference between being stunned and rendered unconscious. I might be stunned and walk around, dazed, not see and hear distinctly, but if I am rendered unconscious, I am knocked down and knocked out.

The Court: Do you care to amend your question?

Mr. Curley: Well, if that is the objection, I will amend it by striking out the word "Stunned," and was rendered unconscious for five, ten or fifteen minutes.

Mr. Elliott: Will the Reporter please note an exception.

(Question read as amended.)

A. I think that could happen without necessarily leaving a scar.

Mr. Curley:

Q. State, Doctor, in what manner a lick on the head, such as I have just described to you, does cause or may cause an abscess of the brain.

A. The sudden jarring might, probably would break a small vein, a very small vein or blood vessel, and a clot would be formed, and around this clot the germs, or in this clot the germs might form or center, and an abscess be started.

Q. That is the manner in which they are formed?

A. Ordinarily formed.

Q. Comparatively what per cent of brain abscesses are the result of strokes on the head?

A. Almost one-half of brain abscesses give a history of having been an injury.

Q. Of an injury?

A. Yes sir; of an injury.

Q. Approximately what per cent. Doctor, of brain abscesses result from inner ear diseases?

A. Approximately two-fifths.

The Court: Of what?

Mr. Curley: From inner ear diseases.

Q. Approximately two-fifths?

A. It is very nearly two-fifths.

Q. Then in your opinion the remaining causes or one-fifth of the abscesses of the brain are caused from what other conditions?

63 A. Are caused from general septic conditions, which percentage would necessarily include then brain tumors and abscesses on all old parts, that is, old clots that had been caused by hemorrhages previously.

Q. Then one-fifth of the brain abscesses are distributed among these other various causes?

A. Yes sir.

Q. Would it be possible, Doctor, for a man to have an inner ear disease of such character as would produce an abscess of the brain, without leaving some marks upon his ear as a result of the disease?

A. I don't think so.

Q. You don't think it would be possible?

A. I think there might be some scars.

Q. You don't think it would be possible for him to have such a disease without leaving a scar upon his ear?

A. No sir.

Q. Have you made any examination of Mr. Bray's ears within the last few days to ascertain whether or not he is carrying such a scar?

A. Yes sir.

Q. In what condition did you find his ears?

A. They were—I did not discover any evidence of any old troubles.

Q. Does the point of injury, Doctor; that is, the point of the blow upon the head necessarily control in ascertaining the location of an abscess? In other words, Doctor, is there any necessary connection between the location of the abscess and the point of injury, or the point that he receives the blow?

A. No, there is not.

Q. There is not?

A. There is not.

Q. A man might receive a blow on the left side of his head and result in an abscess on the other side; is that true?

A. Yes sir.

Q. What, in your opinion, Doctor, is the effect upon the brain of an abscess on the brain which has been opened and drained?

Mr. Elliott: I think I will object to that question, your Honor, unless the region of the brain is specified.

Mr. Curley: I am asking him the effect on the brain as a whole.

Mr. Elliott: I think the region of the brain in which the abscess is located should be specified.

The Court: Objection overruled.

Mr. Elliott: Exception.

The Witness: Now, the question was—  
(Question read.)

A. The effect would be a destruction of some of the nerve cells and the adhesions that would result in the drainage of such an abscess—adhesions between the dura.

Mr. Curley: Would there be any probable future to such a condition?

64 A. The probable future of a loss of nerve cells and adhesions would result in the possibility of the patient having epileptic fits and some sort of mania, organic mania. And there may result also a re-formation of the abscess.

Q. Is that to be anticipated after a person has had one abscess?

A. That may be expected.

Q. In what condition does the removal of the skull or the bone in the performance of an operation to remove the abscess leave his brain as to being susceptible to injury from the outside?

Mr. Elliott: I object to that question, your Honor. The result anticipated here is too remote from the injury claimed to be of any value here—to be considered by the jury, because it is a vague possibility.

The Court: Read the question.

(Question read.)

The Court: I think that question is involved, and I sustain the objection to it.

Mr. Curley:

Q. Do the conditions you have just described, Doctor, with reference to the effect of the abscess upon the brain matter and nerve matter of the brain result in permanent impairment of the brain?

A. Yes sir.

Q. In what way?

A. The nerve cells that have been destroyed have a function, and they will not be replaced. Also the scar tissue that results is permanent.

Q. Would that have any effect upon his ability to perform heavy manual labor?

A. I think so.

Q. State whether or not in your opinion it would be possible for a man upon whom an operation has been performed—to relieve him from the effect of an abscess of the brain and from whose head a circular portion of the cranium about an inch and a quarter or an

inch and a half in diameter has been removed, and an abscess opened and drained, to ever attain a condition sufficiently normal physically to enable him to perform heavy manual labor?

A. No sir.

Mr. Elliott: I object to that question. I think it is a repetition. He asked him the same proposition in a much shorter question.

The Court: Objection overruled.

A. No sir.

Mr. Curley: Would a newly formed abscess probably contain a thin fluid, Doctor?

A. Yes sir.

Q. Would an abscess that had lain dormant in the brain for many months or a year, or years, when opened probably contain thin fluid?

65 A. It would probably contain thick pus.

Q. Probably contain thick pus. Describe to the jury the reason for it. Describe to the jury the difference between a newly formed abscess and an old abscess in reference to the character of pus you would expect to find on opening it.

A. You would expect to find in a newly formed abscess rather a thin fluid and in an older one, in an old abscess thick fluid.

Mr. Curley: You may cross examine.

Cross-examination.

By Mr. Elliott:

Q. Doctor Clyne, haven't you got that turned around; that is, that in a newly formed abscess you would expect to find the thicker fluid, and as the abscess went on and became older you would find the thinner fluid?

A. No, sir.

Q. You stay with that?

A. I stay with it.

Q. All right. Now, if this person, the plaintiff, had been working in a tunnel and a rock had fallen on him, described to you by Mr. Curley here, and that rock cut his scalp in two places, as he testifies, so that blood ran from it in such quantity that it was observed and remarked by a third person working with him would you or would you not consider that there would be some evidence of that cut on the scalp within two months and twenty-two days from the date of that injury?

A. There might be some evidence of it.

Q. Would there not almost certainly be some evidence of it, especially to the eye observing the scalp after the hair had been removed, had been shaven for an operation?

Mr. Curley: I will object to that. There is no evidence that the hair was shaven over that portion of the scalp that was injured.

The Court: Objection sustained.

Mr. Elliott:

Q. Do you not think, Doctor, that there almost surely would be within that time some evidence of that cut?

A. I think there might possibly be some evidence of it. Of course, that would depend upon whether it was just simply a scratch or how deep it was cut.

Q. But if the man had such a cut on his head that the blood was flowing from it, and you could readily observe it, would you consider that he would have evidence of such a scar?

A. Why, no, I don't think so.

Q. If upon careful examination within that time after the injuries I have stated to you no evidence was found of any such scar, wouldn't that create in your mind a doubt as to whether the cuts on the head had been received?

Mr. Curley: I object to that, if your Honor please. There is no evidence here that there was any careful examination at the time.

The Court: Objection overruled.

66 A. Yes sir.

Mr. Elliott:

Q. That would create some doubt then in your mind. You have stated, Doctor, that fully fifty percent of the recorded cases of brain abscess are of traumatic origin, or due to blows received on the head. Now, would the fact that Chruch & Peterson say that twenty-five percent instead of fifty is the recorded percentage change your opinion on that?

A. I appreciate that they will differ on some things. That certainly would have some influence.

Q. Church & Peterson is a standard work?

A. Yes sir.

Q. How many cases of abscess of the brain have you diagnosed in your career as a practitioner?

A. I think I have seen one case of brain abscess diagnosed.

Q. You diagnosed it?

A. No, I assisted in the diagnosis.

Q. Is that Mr. Gray's case, or not?

A. Another one.

Q. Now, you have stated that from your examination of Bray's head and from what he told you, that you thought that the abscess or the condition which was uncovered by the operation must probably have been due to the injury—that was your statement—that he detailed. Now, if he had detailed to you—had told you of having received no injury, would you nevertheless have concluded from your examination positively that the condition that was uncovered in Mr. Bray was due to an injury that had been received on his head?

A. No, sir.

Q. You pin your faith in your diagnosis or rather, you pin your faith in your opinion that that condition that was uncovered



in Bray's head was due to an injury that he received to his head, upon Bray's statement to you with relation to an injury on his head.

Mr. Curley: I object to the question. There is no statement of that kind in the record. I submit.

The Court: Objection overruled.

A. Yes, sir.

Mr. Elliott:

Q. Then if the history is no good, the judgment is no good, and that is no, fault of yours.

Mr. Curley: I object to the question as not proper.

The Court: Objection overruled.

A. Yes sir.

Mr. Elliott:

Q. Doctor Root has testified in this case that the fluid from Bray's head was removed from the left lateral ventricle of the brain. What is the ventricle of the brain?

A. It is a cavity in the brain.

Q. Inside of the brain?

A. Yes, inside of the brain.

Q. How many of them are there?

A. There are four.

Q. Could you describe them just briefly, Doctor, to the jury? I am not asking you to try to get a qualification on you, but just so they will understand you.

A. There are two cavities in the cerebrum which are called the first and second. The third is between that and the medulla and the fourth is lower down. It is near the spinal cord.

67 Q. Now, is there any disease of the brain in which you have fluid or pus in these cavities of the brain?

A. Yes sir.

Q. That you might have it in the left lateral ventricle?

A. Yes, sir.

Q. From which Doctor Root testifies that he removed fluid?

A. Yes sir.

Q. What is the name of that disease?

A. He could have a brain abscess.

Q. Is there any other condition that would produce it?

A. He might have had some meningeal trouble possibly.

Q. What is hydrocephalis?

A. Is the abnormal amount of fluid in the ventricles.

Q. Is that a common condition or disease arising in the brain?

A. Well, I don't think it is very common.

Q. It does occur?

A. It does occur; yes.

Q. Does it not deposit its deposit of fluid or pus within the ventricles or cavities where it is an internal hydrocephalis?



A. It deposits fluid.

Q. Now, when you learned, Doctor Clyne, that this fluid was removed from the left lateral ventricle of Bray's head, did that not create a little wonderment or doubt in your mind as to whether that was an abscess or not?

A. I think that possibly would create more wonderment and doubt than if it were—that is, if it were not removed.

Q. That is exactly where you would expect to find an abscess due to a blow on the head—where would you expect to find it, on the inside or the outside, on the cortex or within?

A. On the cortex is the most common site.

Q. What is the cortex? What do you mean by that?

A. That is the outside of the brain.

Q. Immediately within the skull?

A. Yes, in the area of the brain immediately in the skull.

Q. Do you know the causes for hydrocephalis?

A. I don't know. I don't think I do know any definite causes for it.

Q. Do you understand, or have you ever seen given an injury—an injury as the cause for hydrocephalis, an injury to the head?

A. No sir; I never have understood that.

Q. Isn't it a fact that injury is not given as a cause for hydrocephalis?

A. I don't know, and so I don't remember whether it has anything to do with it.

Q. This hydrocephalis, internal hydrocephalis, as it occurs in the brain is a disease of these cavities?

A. Yes sir.

Q. Now, in your opinion, Doctor, as a physician and surgeon, in order for a blow to produce an abscess in one of these ventricles away in deep in the brain, would it not be almost necessary that that blow which caused it would have been of a most shattering character; that it would have torn things up and would have laid the victim up in bed when he received it

A. Not necessarily.

Q. You have spoken, Doctor Clyne, of a possibility of a recurrence of an abscess where one has once been formed and has been operated upon. Now as time goes on and there is no recurrence, the likelihood of the recurrence becomes less and less, does it not?

68 Q. And where a man is showing a steady improvement considerably over a year after the operation, why, he can begin to get away from the likelihood of a recurrence of the abscess.

A. Yes sir.

Q. Have you seen any evidence of any epilepsy in Mr. Bray?

A. No sir.

Q. Did he tell you that he had had any epileptic fits?

A. No sir.

Q. From your examination of Mr. Bray would you consider that the motor areas of his head have been injured by that abscess?

A. No sir.

Q. The abscess wasn't where the motor areas would be injured?

A. No sir.

Q. Then is it not true, Doctor, that the following of epilepsy in this case is not so likely inasmuch as there has been no injury to the motor areas?

A. Yes sir.

Q. That is true?

A. Yes sir.

Mr. Willott: I think that is all.

Redirect examination.

By Mr. Curley:

Q. What portion of the brain, Doctor, do you refer to in speaking of the motor areas?

A. That would be in the cortex.

Q. In the cortex?

A. Yes sir.

Q. That is what they call the outside of the inside?

A. Yes, outside.

Mr. Curley: That is all, Doctor.

I. E. HUFFMAN, M. D., called as a witness on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Curley:

Q. What is your business, Doctor?

A. Physician and surgeon.

Q. In Tucson?

A. Yes sir.

Mr. Curley: You will concede the Doctor is qualified?

Mr. Elliott: Yes, except I would like to know what particular branch of surgery and medicine he follows:

The Witness: General practice.

Mr. Curley:

Q. General practice?

A. Yes sir.

Mr. Elliott: Well, that will allow me to ask a question. Otherwise, we admit the Doctor is qualified in the case.

Mr. Curley:

Q. Doctor, do you know Mr. Bray?

A. Yes sir.

Q. Have you made any physical examination of Mr. Bray within the last week or such a matter?

A. I have.

Q. What did you find his condition to be, in what condition did you find him?

69 A. Well, I found his general condition fair.

Q. Did you examine his lungs?

A. Yes sir.

Q. In what condition were they?

A. His lungs were in good condition.

Q. How was his hear- action?

A. The heart action good.

Q. Blood pressure?

A. Blood pressure was normal and a depression of the skull back of the ear, probably two and one-half or three inches, where apparently a portion of the skull had been removed; temperature normal.

Q. In an operation for an abscess of the brain, Doctor, in which a portion of the skull is removed, state to the jury how an operation of that kind is performed? What do they do? How is a man prepared for such an operation?

Mr. Elliott: If your Honor please, I object to that question. I think it is irrelevant and immaterial how a man is prepared for the operation. It has no bearing on any of the issues in this case, proving or disproving any contention.

The Court: I sustain the objection.

Mr. Curley:

Q. I will ask you, Doctor, if preparatory to an operation of that kind, if the skin covering the skull is cut and laid back prior to removing the bone from the skull?

A. Why, it is usually a semi-circular incision, and it is laid back, the flap is laid back, and leaving an attachment to the skull.

Q. Assuming, Doctor, that a man working in a tunnel, in a mine, is struck on the head by a falling stone with sufficient force to knock him down and render him unconscious for say five, ten or fifteen minutes, but from which he recovers and experiences no further inconvenience other than the natural soreness resulting from such a blow for four or five days, or probably a week; and assuming that in about four or five days, or probably a week thereafter he begins to experience dizziness when walking, and staggering unsteadily, which condition continues to grow gradually worse for approximately two weeks, when he is unable longer to continue work on account of such condition; and assuming that in about five or six weeks thereafter he is operated upon for an abscess of the brain, and an abscess is located, opened within a short distance, say, three or four inches of the place of injury; and assuming that he had theretofore been in good health and not within several years prior to such injury—having experienced any other injury or illness of any character; what is your opinion would have been the cause of such abscess?

A. I think the blow would have been the cause.

Q. Now, state to the jury why you think the blow would have been the cause? How would you arrive at that diagnosis?

A. Well, by the exclusion of other causes upon examining the patient and taking his statement and finding that there was no other cause for the injury, for the abscess, and that together with the fact that there was an injury would indicate that the abscess was caused by the injury.

Q. Approximately what proportion of abscesses of the brain are due to external injuries on the head?

A. Well, nearly one-half.

Q. Nearly one-half. Within what radius, Doctor? Do the authorities agree upon the number of abscesses due to external injuries of that character?

70 A. From one-fourth to one-half.

Q. In your opinion nearly one-half are due to that cause?

A. Yes sir.

Q. To what cause is the remaining—what causes are the remaining abscesses of the brain usually traceable?

A. To septic conditions, middle ear disease, and other septic conditions.

Q. Approximately what proportion of abscesses of the brain are due to inner ear diseases?

A. Probably about two-fifths.

Q. Then in your judgment about two-fifths of all abscesses of the brain are due to inner ear diseases?

A. About two-fifths.

Q. And nearly one-half are due to external injuries?

A. Yes sir.

Q. In what manner, Doctor, is an abscess of the brain caused—by a stroke on the head, a lick on the head?

A. Well, that would be caused by the injury to the—by the jar causing an injury to the brain, probably a breaking of a vessel, or lowering the vitality of the brain tissue until the germs would find lodgment there and start an abscess, formation of an abscess.

Q. Then any stroke on the head sufficiently hard to rupture any of the small blood vessels of the head would be liable to produce an abscess?

A. It might; yes sir.

Q. Would it be necessary to fracture the skull in order to produce an abscess?

A. No, I don't think it would.

Q. Does the point of injury, Doctor, necessarily, control the location of the abscess?

A. It does not.

Q. What in your opinion is the effect on the brain of an abscess of the brain which has been opened and drained?

A. It necessarily leaves impairment of the brain tissue which will not be re-formed.

Q. Do you regard such a condition as a permanent injury?

A. I do.

Q. State to the jury why, Doctor.

A. Because the brain tissue that has been injured is not regenerated—rebuilt and the repair is accomplished through the formation

of scar tissue, which, of course, has no—hasn't the same function that the brain has, the brain cells.

Q. What is the probable outcome of a condition of that kind, Doctor, upon the future condition of the patient?

A. You mean what might result from it?

Q. Yes.

A. Epilepsy or traumatic dementia might result.

Q. What would you say as to the probability of a person who has been operated upon for a brain abscess and an abscess discovered and opened and drained ever again reaching such a normal condition as to permit him to do heavy manual labor?

A. I don't believe that he ever will.

Q. Why?

A. Because of the necessary destruction of brain tissue?

Q. Would the heavy manual labor have some effect upon the brain as it remains after the operation?

A. It would probably increase the chances of those things following that have been mentioned.

Q. That you have mentioned?

A. Yes.

Mr. Curley: You may cross examine.

71 Mr. Elliott: If your Honor please, it is very close to twelve o'clock, and my cross examination will surely run over this space of time.

The Court: The jury will report at 1:30.

FRIDAY, Dec. 3rd, 1915—1:30 p. m.

The Court: Proceed.

Cross-examination.

By Mr. Elliott:

Q. Now, Doctor Huffman, if Mr. Bray, the plaintiff here in this case, never did receive any injury to his head, then this condition you have described in his head would be due to some other cause, would it?

A. Yes sir.

Mr. Elliott: That is all.

MRS. MABLE BRAY, called as a witness on behalf of the plaintiff herein, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Kearney:

Q. State your name, please.

A. Mrs. Mabel Bray.

Q. Mrs. Bray, what relation, if any, are you to Mr. Bray, the plaintiff in this case?

A. His wife.

Q. In August, 1914, where were you living?

A. In Morenci, Arizona.

Q. Where was Mr. Bray working at that time?

A. For the Morenci-Arizona Copper Company, Morenci.

Q. Do you remember the time that Mr. Bray was injured?

A. Yes sir.

Q. While he was working for the Arizona Copper Company?

A. Yes sir.

Q. About August the 4th, 1914?

A. Yes sir.

Q. That was at Morenci, that he was injured?

A. Yes sir; at Morenci.

Q. Do you remember Mr. Bray's coming home one evening after work?

A. Yes sir.

Q. And do you remember of his complaining of some injuries?

A. Yes sir.

Q. Do you know what they were?

A. Yes sir; he came home looking quite pale.

Mr. Elliott: I object to the question, your Honor, on the ground that the complaint does not make Mrs. Bray competent or relevant.  
The Court: Objection sustained.

Mr. Kearney:

Q. What injuries, if any, did Mr. Bray have?

72 A. Hit on the head with a rock.

Mr. McFarland: If the Court please, if the witness knows of her own personal knowledge; not what he said.

The Court: Anything that Mr. Bray told you would not be competent evidence. Just state what his condition was, if you know. State what you know of your own personal knowledge; not anything that he told you.

Mr. Kearney:

Q. That is, what you saw and observed. Now did you examine him that evening?

A. Yes sir, I examined him and there was blood on his hair. His hair was quite long, and there was blood on his hair, and I bathed the wounds, two cuts, and he went to bed.

Q. I didn't understand you, Mrs. Bray?

A. I bathed the wounds. There were two cuts and I bathed them, and he went to bed.

Q. And on what part of his head were those wounds?

A. On the left side.

Mr. Kearney: That is all.

The Court: Any cross examination?

Mr. Elliott: No questions, your Honor.

The Court: That is all, Mrs. Bray. You may be excused.

Mr. Kearney: We rest.

Mr. Curley: The plaintiff rests.

The Court: Call the first witness for the defendant.

Mr. Elliott: If your Honor please, I would like to call the plaintiff, Richard Bray, under the statute for the purpose of cross examination, as a party.

The Court: Come around, Mr. Bray.

RICHARD BRAY, called as a witness for the defendant under the statute, having been previously sworn, was examined and testified as follows:

Cross-examination (under the statute).

By Mr. Elliott:

Q. How long did you work for the Arizona Copper Company at Morenci?

A. I was in the second month.

Q. How long altogether did you work for the Arizona Copper Company while you were in Morenci?

Mr. Kearney: I object to that as immaterial and irrelevant.

The Court: What is the purpose of the question?

73 Mr. Elliott: I wish to show the period which he was employed by the defendant at Morenci. He has testified that he was in the employ of the defendant. Now I wish to know the period.

The Court: That is admitted to your answer.

Mr. Kearney: That he was employed by the defendant, yes.

The Court: Objection sustained. I will change my ruling on that. I will overrule the objection because—go ahead.

(Question read.)

The Court: Answer it.

A. Why, I was in my second month when I got hurt—when I laid off.

Mr. Elliott: On or about what date did you go to work for the company?

A. The 15th of July, as near as I can tell.

Q. 1914?

A. Yes sir, night shift.

Q. Did you have any physical examination at the time you went to work?

A. Yes sir.

Q. What was the nature of that examination?

A. Well, I went to the office with—when I got hired I got a card from the foreman to take to the doctor, and I went in there and the doctor said, "you are o. k.——"

Mr. Curley: Never mind. Did you have any physical examination; that is the question.

A. No, I never had any. He marked me card o. k., and give me the card back.

Mr. Elliott:

Q. What doctor examined you?

A. Doctor Goodrich. I had to have that card before I could go to work.

The Court: You had better just answer the question.

Mr. Curley: Just answer the question, Mr. Bray, and stop.

The Witness: All right.

Mr. Elliott:

Q. Mr. Bray, after going off shift on the day on which you claim you received your injury, did you not have a conversation with a man by the name of William Jane outside of the tunnel in which you were working?

Mr. Kearney: I object to that as immaterial and irrelevant.

The Court: Objection overruled.

A. Yes.

Mr. Elliott:

Q. Who was present at that conversation?

A. Why, Noah Green.

Q. That was your partner?

A. That is my partner.

Q. How much of the time that you were working for the company, did Noah Green work with you?

74 A. Well, all the time as far as I know.

Q. He was working with you all the time?

A. Yes, as near as I can tell. Probably there might be a shift that he didn't; I don't know.

Q. What, if anything, took place at this meeting or conversation among you three, yourself, William Jane, and Noah Green?

Mr. Kearney: I object to that as immaterial and irrelevant.

The Court: Unless it has some bearing on this case. I cannot tel-

Mr. Elliott:

Q. I will ask you, Mr. Bray, if in your deposition in Salt Lake City, you did not state that you and Noah Green walked outside of the tunnel after quitting on the day on which you claim you got your injury, and on the outside met William Jane and stopped there waiting for the whistle to blow, and while there you stated—Noah Green told William Jane about your having been hit on the head with a rock and knocked unconscious?

A. Yes sir.

Q. That conversation took place, did it?

A. Noah Green told William Jane, yes.

Q. I will ask you, Mr. Bray, if it is not a fact that when you went to the hospital after this injury which you claim, upon repeated questionings as to whether you received an injury or not, that you denied having received that injury?

Mr. Kearney: I object to that, if your Honor please. The purpose there is to get in a conversation that took place there between this witness and the Doctor. It is a privileged communication.



The Court: The objection is sustained unless you ask him another question, with whom the conversation took place.

Mr. McFarland: There is nothing in that question that involves any confidential communication between Mr. Bray and the Doctor. It may have possibly been between some other people.

The Court: I don't know whether it was a doctor or not.

Mr. McFarland: It would only be incompetent provided it was said to the doctor. It might have been said to someone else not connected with the hospital, and no physician connected with the hospital.

The Court: Well, you gentlemen know whether it was in response to some question propounded by the physician. I think you should disclose it, and if there is an objection to it, the court will rule on it.

Mr. Elliott: I will ask him one or two pre-mininary questions.

The Court: All right.

Mr. Elliott:

75 Q. You consulted doctors, did you, after you claimed this trouble came upon you at Morenci?

A. Consulted doctors?

Q. Yes, did you go to any doctors?

A. After I was hurt?

Q. After you say you were hurt, yes.

A. No, not until—I worked up until the 18th. I never snitched.

Q. After the 18th did you go to see any doctors?

A. What?

Q. Did you go to see any doctors after the 18th?

A. I went to the hospital.

Q. Did you go and see any doctors?

A. I saw the doctor.

Q. What doctor did you see?

A. Doctor Goodrich.

Q. Any others?

A. Doctor Stanton.

Q. Whose doctors did you consider Doctors Goodrich and Stanton were when you consulted them?

Mr. Curley: I object to that as immaterial.

Mr. Kearney: They attended him. It doesn't make any difference.

Mr. Curley: He went to consult them.

Mr. Elliott: If your Honor please, I believe not. If a person goes to a doctor, knowing that there are other doctors, and if he goes there for the purpose of allowing an examination for another person, he would not create a privilege then. It would be entirely a question as to how the prospective patient looked at the thing himself.

The Court: I think that very question was decided in the Clerke case adversely to your contention. I will sustain the objection on the ground that it is objected to by counsel for the plaintiff because it appears that if such a statement was made it was a confidential communication between this witness and the physician.

Mr. Curley: Yes, that is the ground of our objection.

Mr. McFarland: May we have an exception noted?

The Court: Yes.

Mr. Elliott:

Q. Now, Mr. Bray, I will ask you this question: when you first went to see Doctor Goodrich, is it not a fact that upon repeated questionings by him as to whether you had received a head injury you did not deny receiving those injuries?

Mr. Curley: I object to it, if your Honor please, as a privileged communication.

The Court: Objection sustained. Now do you admit that at that time this physician, or these physicians were at the hospital and in the employ of the hospital for the purpose of attending the employees of the company? If not, why, I think the record had better show that on examination; I think this witness better be examined with reference to that matter before I rule on the question, if there is any question about it.

Mr. Curley: The witness has stated that he went to the hospital. The Court: And as to whether or not the conversation took place there. In other words, show the relation of physician and patient.

Mr. Curley: I understand.

The Court: If there is any question about it.

Mr. Kearney: They will not deny that.

The Court: I do not know what they will deny.

Mr. Kearney: We will ask the witness a question for the purpose of laying the foundation.

Q. Mr. Bray, were this the company hospital, A. C. Company hospital you went to?

A. Yes sir.

Q. And were these physicians there at that hospital for the purpose of treating employees who became injured?

A. Yes sir; each man pays \$1.80 or \$1.85 a month for that service.

Q. And in that way those physicians are employed by the employees?

A. Yes sir.

Q. And you went there for the purpose of consulting them?

A. Being treated.

Q. About your injuries for your benefit?

A. Yes.

Q. And you consulted those physicians for the purpose of receiving medical treatment from them?

A. Yes sir.

Mr. Kearney: That is all.

The Court: Now, then, you object to the introduction of any testimony, or any conversation between either one of those physicians and this witness?

Mr. Curley: Any conversation or the result of any examination.

The Court: On the ground——

Mr. Curley: —that it is a privileged communication.

The Court: —that it is a privileged communication; and I will sustain the objection.

Mr. McFarland: Now, if the Court please, I understand that these physicians were employed by the employees of the Arizona Copper Company, as stated by Mr. Bray.

The Court: Well, go ahead.

Mr. McFarland: If that be true, the action of those physicians would not be binding upon the defendant; because they might be employed by this hospital, by the employees, and in consideration of a certain monthly payment, it wouldn't necessarily follow that they were physicians for the defendant.

77 The Court: It seems to me it doesn't make any difference whether they were physicians employed by Mr. Bray or whether they were employed by the company. If he had consulted them in their professional capacity, then I think all communications which passed between him and such physician or physicians were confidential, and on his objection cannot be repeated here at this trial.

Mr. McFarland: We except.

Mr. Elliott: I should like to ask one more question.

The Court: You may for the purpose of the record, if you desire.

Mr. Elliott: If I am going too far after the Court's ruling;—I don't intend to press it intentionally.

The Court: I understand. If you want to preserve the record and the exception, I will permit you to ask another question along that line.

Mr. Elliott:

Q. I will ask you, Mr. Bray, if on the taking of your deposition in Salt Lake City in October of this year you weren't asked if, when you went to see the doctors in Morenci, upon repeated questioning, if you had received such an injury, you didn't deny having received that injury; and did not reply that you might or might not?

Mr. Curley: I object to that, if your Honor please. The objection was made at the time in Salt Lake City when that question was asked that it was calling for—it was a confidential communication.

The Court: Objection sustained.

Mr. McFarland: We except to that.

The Court: I also sustain the objection to the questions that were asked this morning, and which I took under advisement. They were not read and need not be read. I will give you the benefit of an exception now, if you desire it.

Mr. McFarland: No sir; not on the ruling this morning.

Mr. Elliott:

Q. Mr. Bray, did you or did you not, report the fact of this injury which you have detailed to this jury, to any agent, officer connected with the Arizona Copper Company, Limited?

Mr. Curley: I object to that as too indefinite.

The Court: Objection overruled.

The Witness: What was the question?  
(Question read.)

A. Not to my knowledge.

78 Mr. Elliott:

Q. Did you not know that it was your duty as an employee there to report any injury which you received in the employ of the company?

Mr. Curley: Objected to as argumentative, and not proper cross-examination.

The Court: This witness is called under the statute.

Mr. Curley: Yes, I object to it. It isn't proper cross-examination; that it is argumentative, immaterial and irrelevant—it is not shown that such a rule ever existed.

Mr. McFarland: If the Court please, just on that one question; I think it would tend to show his delay or not reporting it at all. The jury might consider that with reference to what it is worth as to whether or not there was any injury at all.

The Court: As to whether or not he did not know whether it was his duty to report it, is the question.

Mr. McFarland: He can answer that "yes" or "no."

The Court: Well, in the absence of any rules, and in the absence of any showing that he was familiar with those rules, I will sustain the objection.

Mr. Elliott:

Q. Did you know of any rule or requirement of the Arizona Copper Company that an injured employee should report his injury?

A. I never saw any.

Q. Did you know of such a rule?

A. No, I did not know it.

Q. Don't you know that is the custom all over the mining districts of the West?

Mr. Curley: Objected to as immaterial.

The Court: Objection overruled.

Mr. Elliott:

Q. Don't you know that?

A. I don't know as it is in every camp. I know it is in some.

Q. You have stated that your expenses from Morenci, Arizona, to Salt Lake, Utah, were \$150; that part of that was for taking care of your wife, taking her from Morenci, to Salt Lake.

The Court: There has been no showing made as to how much he paid out, and in the absence of that I charge the jury that he could not recover anything for that. There is no use of cross-examining on that point, because they haven't made a sufficient showing to entitle them to recover any part of it.

Mr. Elliott:

Q. You testified, Mr. Bray, that a rock fell from the side of the

tunnel in which you were working, a distance of four or five feet, striking you upon the head. Now what was the size of that rock?

A. I couldn't tell you. I have told you that a thousand times, about the size of the rock, and every other thing about it. I couldn't say, or about the height either.

79 Q. I asked you yesterday if you did not state in the taking of your deposition in Salt Lake, that that rock weighed forty-five or fifty pounds.

A. Well, I—

Q. Just a moment. Wait until I get through with my question. And you answered me by saying that it was my talking that made you say that it was forty-five or fifty pounds. Now I ask you this: didn't these questions and answers take place in the taking of this deposition in Salt Lake between yourself and your own attorney, Mr. Sullivan, upon your direct examination. "Could you tell us about the size of the stone that fell—give us any idea? If so, do so." You answered, "It was something as near as I can tell, pretty near as big as that tab there (indicating) that folder, whatever you call it. It was quite a rock. The ground, you know there, is kind of soapy, and it breaks easy." By the "tab," you referred to a tablet on the table which was apparently thirteen or fourteen inches wide by twenty-two or twenty-four inches long. Your attorney asked you, "I will ask another question, "About what was the dimensions, as near as you can tell, of that stone; how many inches." Answer. "I couldn't tell." "About what would be its weight?" "I couldn't tell exactly. It was quite a rock." "Was it as large as your head?" "It seemed to be longer than it was in depth, in thickness, about like that (indicating), as near as I can tell." Then your attorney said, "That does not appear in the record. The jury could not tell from that. About how many inches would you say it was each way?" And your answer, "Well, it was probably eighteen inches long, as near as I can tell. I couldn't tell within an inch or two."

A. I say that now; that I couldn't tell, nor I can't.

Mr. Elliott: That is all.

Mr. Kearney:

Q. Was this rock that fell on you a hard rock like granite or was it a soft rock?

A. It was soft. It wasn't a country rock at all. It was ore. It was copper ore, soft nature.

Q. Soft nature?

A. Yes.

Q. When it fell, did it break to pieces?

A. When it struck me it busted and fell all over the place. It wasn't a big—

Mr. Kearney: That is all.

Mr. Elliott: That is all, Mr. Bray.

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RICHARD WILLIAMS, called as a witness on behalf of the defendant herein, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Elliott:

Q. State your name to the Reporter and the jury, please.

A. Richard Williams is my name.

Q. Where do you reside?

A. Morenci.

Q. Do you know Richard Bray, here, the plaintiff in this case?

A. Yes sir. I knew him while he was in Morenci.

80 The Court: Mr. Williams, you look like a healthy, stout man. The farthest man on that jury there has to hear every word you say. Now, just speak as if you were talking to him, and ignore the balance of us.

Mr. Elliott:

Q. Do you know the Arizona Copper Company, Limited?

A. Yes sir.

Q. The defendant in this case?

A. Yes sir.

Q. What, if any, position with the Arizona Copper Company—

A. Shift boss.

Q. —have you occupied?

A. Shift boss.

Q. Where?

A. In Morenci, A. C. Mine in Morenci.

Q. At Morenci?

A. Yes sir.

Q. Were you acting in the capacity of such shift boss in the months of July—

A. Yes sir.

Q. —August and September, 1914?

A. Yes sir.

Q. And you were so occupying that position up to the time of the strike?

A. Yes sir.

Q. Did Richard Bray at any time report to you having received an injury by having a rock fall a distance of four or five feet and strike him on the head and knocking him down, rendering him unconscious, while in the employ of the Arizona Copper Company?

A. No, sir; he never did.

Q. Do you remember the last day on which Richard Bray worked for the Arizona Copper Company?

A. Yes sir; I remember the last day he came to work.

Q. Where had Bray been working immediately preceding the time he left?

A. He had been working all the time on the 130-foot level in the Eagle section of the mine.

Q. That was in the Humboldt Mine?

A. Humboldt Mine.

Q. How long had he been working at this particular place?

A. Well, I couldn't say exactly; about a month, I should think, a little more. He worked at that place all the time he worked, at that one level.

Q. Generally, what was the character of work he was doing?

A. He was repairing a tunnel there, a small tunnel.

Q. State how often you would have occasion to go to this place, or through the place, or by it, where Richard Bray was working.

A. Well, I go through there about four times a shift.

Q. Four times each day?

A. I beg your pardon?

Q. You go, there or by there, or past there, about four times a day?

A. Yes, I pass there. Sometimes it might be more.

Q. You were the shift boss on the shift upon which Mr. Bray worked?

A. Yes sir.

Q. In going to this place, or by it, did you or did you not have occasion to see or take notice of Richard Bray?

A. Yes sir; I was responsible for the work he was doing there.

Q. At any time prior to the day on which Mr. Bray laid off did you notice any peculiarity in his actions?

A. No sir; I never did.

Q. How did he seem with respect to being a normal man?

A. Well, he seemed to be all right to me, every time I saw him at work.

Q. He was doing his work properly?

A. Yes sir.

Q. Made no complaint to you?

81 A. No sir, he never made any complaint to me.

Q. Now, on the last day, on which Mr. Bray worked for the company, which you say you recall, did you have any conversation with him?

A. The last morning he came to work for me was—Yes.

Q. What was that conversation?

A. He told me he wasn't feeling well. His head was awful light.

Q. Speak slowly and loudly.

A. He wasn't feeling very well that morning. His head was awful light, he said, and he couldn't work very well, and he didn't think he would be able to work.

Mr. Curley:

Q. His head was light?

A. Yes sir; he said his head was light. I told him he had better go home if he felt he couldn't work. He said he would try it; he didn't want to lay off if he could help it. So he went up to the mine—I don't know; it couldn't have been very long; it might have been two or three hours, I went through the place where Mr. Bray had already been working in, and he had already gone home.



Mr. Elliott:

A. At that conversation did Mr. Bray say anything to you at all about having sustained an injury?

A. No sir; no.

Q. Did he say anything at all about having been hit on the head with a rock and rendered unconscious?

A. No sir; he never said anything.

Q. What, if any, equipment exists about this place where Richard Bray was working for rescue work, of giving first aid to the injured?

Mr. Kearney: Objected to as immaterial.

The Court: I couldn't get all of that question.

(Question read.)

The Court: Objection overruled.

Mr. Elliott:

Q. Do you understand the question?

A. Yes sir. There was a first aid box on the same level where he was working, maybe one hundred feet away from where he was working.

Q. I will ask you what would be the thing done, as a common practice, in the mine at Morenci in the event that a miner or timberman was working with his helper, and in the presence of his helper the timberman should sustain such an injury as by being hit on the head with a rock and knocked unconscious for a period of, we will say, from five to ten minutes?

Mr. Curley: I object to that.

The Court: Objection sustained, because there is no testimony that the person injured in this case made any report of the injury or the accident, and therefore, nothing could have been done.

82 Mr. Elliott: My point was, in showing the equipment that was present and the general practice in such mines, that the general workmen are accorded first-aid to the injured.

The Court: I will permit you to show the equipment for the purpose of enabling the jury to consider that fact in connection with all the facts in the case; the fact that this man has been injured and needed assistance; that he could have gotten assistance at that time and place. But I think that is as far as I can go. I will sustain the objection to the last question.

Mr. Elliott:

Q. Was that the last time which you saw Mr. Bray when he quit work at the mine?

A. The last time I saw him on the property, yes.

Q. On the property?

A. Yes.

Q. Did you see him or have any conversation with him subsequent to that time?

A. Well, maybe a week after I went to his house. His brother told me he was sick and wasn't feeling good, and I went over and saw him one evening.



Q. Will you talk a little more loudly.

A. A week, it may have been four days or a week; I couldn't tell exactly, sometime after Mr. Bray was home his brother told me he was awful sick, and I went over to see him one evening, and he told me he was feeling bad in the head, but he never mentioned having got hurt to me in the mine, and no more than he said that he thought that the doctor—He said that he felt bad in the head, felt light in the head—was caused from some blow. So I asked Mr. Bray if he had had some pain in the head, and he said he did not remember except sometime before that, he didn't know exactly when, a little small rock had hit him in the hind part of the head. But he said he didn't think that had anything to do with the injury at all, or sickness then. That is what he told me there in his house that night.

Q. On what part of the head was it, on the back of the neck?

A. He said he remembered of a small rock striking him just in the back of the head there, just above the neck. It was a very small rock, he said. He didn't think that caused the injury to his head.

Q. That conversation took place two weeks after Mr. Bray had quit work for the company altogether?

A. Two weeks?

Q. Yes.

A. No, sir, I don't think it was quite two weeks after.

Q. How long was it?

A. It might have been a week; I don't know; I couldn't say exactly.

Q. About a week?

A. About a week, I should judge. I know it was several days after he had stopped *home*.

Q. Did Mr. Bray ever go back to work for the company after that conversation?

A. No sir; no; I never saw him no more after that.

Q. At that conversation you had at Mr. Bray's house probably a week after he quit work—

A. A week, sir.

Q. —he didn't tell you of having received an injury by having a rock fall four or five feet and strike him on the head, and knocked him down and rendered him unconscious.

83 A. No sir; he never did. He never reported anything of that to me at all.

Q. Have you any interest whatever in the outcome of this suit?

A. No sir.

Q. Have you ever talked to anybody about this suit?

A. No sir; no, I never talked to nobody about it, sir, no more than Mr. Kiddie asked me to come down here as a witness. That is all the talking I did.

Q. Your brother did?

A. Mr. Kiddie asked me to come here as a witness.

Q. You have talked with me about the suit?

A. Yes, I have.

Q. And Mr. Kearney?

A. Mr. Kearney—well, Mr. Kearney mentioned about it in Lordsburg in the morning while we were coming down.

Q. While you were coming over here?

A. Yes sir.

Q. Is anybody paying you anything to testify in this suit?

A. No sir.

Q. Your expenses are being paid?

A. Yes sir.

Q. You were subpoenaed by the defendant in this case?

A. Yes sir.

Mr. Elliott: That is all.

Cross-examination.

By Mr. Kearney:

Q. You don't claim that you told me anything about the case, do you?

A. No sir; I didn't tell you anything.

Q. Did you tell me what you have told here on the stand?

A. You asked me—

Q. Did you tell me anything about the case?

Mr. McFarland: I insist that the witness ought to be allowed to answer.

The Court: Let the witness answer the question.

A. You just asked me was I a witness in the Bray case, coming to Tucson, and I told you, yes, I was.

Mr. Kearney:

Q. That is all you told me then?

A. That is all I told you, sir. You tried to make me talk quite a bit.

Q. You didn't talk?

A. I didn't feel like talking.

Q. I thought so.

A. I was hungry that morning, and I wanted breakfast more than talking there.

Q. You did, since you have come here, you talked with Mr. Noah Green.

A. No sir; nothing about the case.

Q. I asked you if you have talked to him—

A. Oh, I have walked up and down the street here with Green, of course. I never talked nothing about no suit or no case whatever.

Q. Didn't you talk to him at the Santa Rita Hotel?

A. No sir, no. I have seen Mr. Green up there but I never did no talking to him about no case.

84 Q. Isn't it a fact the other day, the other morning, two mornings ago, I went up to the Santa Rita Hotel—

The Court: Mr. Kearney, I cannot hear a word you say when you put your hand up that way.

Mr. Kearney:

Q. Isn't it a fact that two mornings ago I went up to the Santa Rita Hotel and you and Mr. Green were sitting there on the settee talking?

A. Mr. Green and I might have been sitting there, but I wasn't talking with Mr. Green anything about this case.

Q. You were talking with Mr. Green, however?

A. Yes, I was talking with Mr. Green. I claim I have a right to talk to Mr. Green.

Q. Now, you are one of the officers of the Company, aren't you? You have charge there of the shift department?

A. Shift boss.

Q. Do you claim to be a physician?

A. Physician?

Q. Yes sir.

A. No, I am no physician, no.

Q. You think an injured employee should tell you his injuries so that you could treat him?

A. Yes sir; if he was hurt, he would.

Q. You think you could treat his injuries?

A. Well, I can do first-aid a little, enough to tie a man up if he is hurt and send him out for a doctor, in that way. I know sufficient for that, if he had a cut in the head or his hand was cut.

Q. Isn't it a fact that every time an employee gets injured up there that you officers go to everybody and try to get them to make a statement?

Mr. Elliott: I object to that question as being utterly incompetent, irrelevant and immaterial.

The Court: The objection is sustained.

Mr. Kearney: Isn't it a fact that in the interests of the Company, when an employee is injured, that you or one of the other officers go to that employee and try to get a statement as favorable as you can for the company?

Mr. Elliott: We object to that, your Honor, on the same ground. I believe that is an unfair, unjustified, unqualified imputation here.

The Court: I will sustain the objection. What is done in other cases in that regard has nothing to do with this case.

Mr. Curley: We are trying to show the interest that this witness has in the defense.

The Court: That is not the proper way to show it.

Mr. Kearney:

Q. When you called on Mr. Bray there didn't you call on him in the interest of the company?

A. In the interest of the Company? The company didn't know I was up there.

Q. His wife was present at this conversation?

A. Yes sir; Mrs. Bray was there when I came to see him.

85 Q. Mrs. Bray and Mr. Bray were present at this conversation?

A. Yes sir. Yes sir; I went there through his brother. Somebody—somebody told me his brother was sick, and I went over through my own kindness to see Mr. Bray, and to know what was the matter with him. Being a stranger in the camp—he hadn't been there very long—I thought it was proper to go and see the man, as his brother was all the time telling me every morning that he was awful sick. But the company never knew, none of the company never had any idea that I went to the house. I never thought of saying anything to the company about going to the house.

Mr. Kearney: That is all.

Mr. Elliott: That is all, Mr. Williams.

The Court: Call your next witness.

Mr. Elliott: I will call Doctor Butler.

JOEL I. BUTLER, M. D., called as a witness on behalf of the defendant herein, having been first duly sworn, was examined and testified as follows:

Direct-examination.

By Mr. Elliott:

Q. State your name, Doctor.

A. Joel I. Butler.

Q. What is your profession?

A. Physician and surgeon.

Mr. Curley: We will concede that the Doctor is qualified to testify.

Mr. Elliott:

Q. Where are you practicing?

A. Tucson.

Q. What, if any, institution are you connected with here?

A. The Rodgers Hospital.

Q. Do you do any special line of work with the Rodgers Hospital?

A. Yes sir; surgical work.

Q. Doctor, what are the ventricles of the brain?

A. They are spaces inside of—cavities inside of the lobes of the brain.

Q. On the inside?

A. On the inside.

Q. How many of them are there?

A. There are four of them recognized. In all, there are five; two being part organs.

Q. Now, Doctor Root of Salt Lake City, Utah, who operated on Mr. Bray, the plaintiff in this case, has testified here that he operated upon Bray's head and removed a thin fluid from the left lateral ventricle of Mr. Bray's head,—brain. Now, I will ask you if there is any disease of the brain in which you have fluid or pus in these cavities of the brain?

A. Yes, there are several conditions in which fluid accumulates.

Q. State what, if any, diseased condition there is in which the fluid would accumulate in the cavities.

86 A. Well, there is an accumulation of fluid in these cavities known as internal hydrocephalis. There are various causes for this accumulation.

Q. What generally are the causes of this internal hydrocephalis?

A. The causes are classified as—the accumulation of fluid is due in the most common instances to increased production of this fluid, and some obstruction to the outflow of the fluid from the ventricles, or any obstruction to the outflow of this fluid from the ventricles. There is ordinarily a formation of this fluid in the ventricles, which is drawn off through different channels, and consequently, there is a certain normal amount kept in them constantly. Now, if for any reason there is an obstruction to this outflow, there is an accumulation takes place. Now this obstruction may be a mechanical one. These drainage channels may be plugged from various causes, and the increased secretion, increased production of this fluid has a number of causes, inflammation of the secreting surfaces of these cavities. It is seen in meningitis, cerebral spinal meningitis; there is always an increase if there is a condition present that causes an increased flow, as may be present from tuberculosis, syphilis, any irritating process going on in these cavities plus an obstruction to the outflow.

Q. Please state whether or not external head injury is recognized as a cause of internal hydrocephalis?

A. I never have known any such case, or seen any such causation given in the literature.

Q. In your experience, has an external head injury ever produced this disease of one of these cavities?

A. No, I stated that I had never seen it. It is not recognized as a cause.

Q. Then if you had a case where a thin fluid or a thin pus was found in a ventricle of the brain and there was no evidence of any external head injury, and you had no history of such injury, might not such condition—might not such thin fluid or thin pus be due to an internal hydrocephalis?

A. It could.

Q. In a diagnosis, Doctor, how do you distinguish between a brain abscess produced by an external injury to the head and a brain abscess produced by other causes?

A. Well, in the first place, you would look for evidences of external injury. The abscesses caused by external injury are most commonly located directly beneath the site of the injury. That would be one strong evidence. I say the evidence of injury to the scalp or skull would be a strong point in favor of injury being the cause.

Q. You mean by that, the appearance of scars indicating a cut or some evidence of abrasions or a blow on the head?

A. Yes sir?

Q. That is, being visual?

A. Yes sir.

Q. You could see it?

A. Yes sir.

Q. What, if any, part would the history related by the patient, history of the blow, play in the diagnosis?

A. Well, ordinarily, you would accept a patient's statement that there had been a blow, if he stated that there had been a blow you would accept that as truthful statement on his part, and assisting you in making the diagnosis. You would then examine the skull to see whether there was evidence of injury.

87 Q. Now, if you had a brain abscess, diagnosing it, if you had no evidence of any external injury and you had no history of the injury, then would there be any other distinctive feature that might distinguish a brain abscess due to a blow on the head from a brain abscess that was due to one of the many other causes you have enumerated?

A. Absolutely not.

Q. Now, Doctors Root, Evans and Galligan, all of Salt Lake City, and who operated on Bray, have testified that they found no evidence at all of an external injury to the head, even after shaving part of the scalp preparatory to performing the operation. As to the shaven part, no scar on the scalp was observable and no injury to the skull was to be seen. Now would or would not the absence of all evidence of such prior injury to the head cause you to entertain a doubt that Bray had received such an injury to his head; that is, by being struck on the head by a rock weighing forty-five or fifty pounds and falling four or five feet?

A. It would.

Mr. Curley: I object to that question as not *begin* predicated upon the evidence. They made no examination for the purpose of seeing whether there was a scar. The portion of the scalp that was shaven and laid back for the purpose of this operation isn't the portion of the scalp upon which he received his injury. The question is absolutely unfair and is not predicated on any evidence in the case.

Mr. Elliott: If your Honor please, I believe both Doctor Root and Doctor Ewing, the two big experts in this case, testified that they made the most careful examination and that they recognized the existence of the scar as one of the important diagnostic features.

The Court: I will overrule the objection. I believe the doctor has answered the question.

Mr. Elliott:

Q. It would create a doubt?

A. Absolutely; there would be no evidence to base a diagnosis of injury on.

Q. Now, Mr. Bray has further testified that his scalp was cut in two places by this rock. Now, do you consider it likely that those two cuts would heal and leave no scar whatever upon the scalp as evidence of that prior injury within two months and twenty-two days of the date of the injury?

A. The scalp would not heal without having a scar present any

more than any other tissue would; that is, I should expect to find a scar.

Q. And you would expect to find it particularly within that short period from the date of the injury?

A. More likely if it was a cut through the skin, I should expect it to be permanent, a permanent scar regardless of time.

Q. There has been evidenced introduced here, Doctor, to the effect that where they have conditions of this kind, as in Bray's head, an accumulation of fluid in the ventricle, or an abscess, that after it is drained and it has healed up there may be some possibility of a recurrence of the abscess, or the condition. Now, I ask you, as time goes on and there is no recurrence, as a point of fact, doesn't the possibility of the recurrence grow less and less?

88 A. Yes.

Q. Now, upon your knowledge of anatomy and surgery, would a lesion in the left lateral ventricle indicate a lesion in the motor area of the brain?

A. No, it is nowhere near the motor area of the brain.

Q. Now, evidence has been introduced here to the effect that epilepsy might be a result, or an after-condition, from this condition in Bray. I ask you if the probability of the happening of epilepsy, or of the having of fits, is likely by the fact that the motor areas of the brain have not been affected?

A. Yes sir.

Q. Epilepsy under such circumstances would not be likely or would it?

A. No, it would not occur, or it would be very improbable to occur.

Q. What percent of abscesses, Doctor, is caused by traumatism, external injuries and violence?

A. Abscesses in general or abscesses of the brain?

Q. Abscesses of the brain?

A. Various figures are given varying from one-fourth to one-half.

Q. What are the later statistics on that, if you know?

A. What is that?

Q. What are the later statistics on that, if you know?

A. Well, they are varying with the experience of the different men, and the regions which they are familiar with. That is—and the statements dating practically from the same period—of within five years—they differ. I say they differ from twenty-five to fifty percent.

Q. Are you familiar with Church & Peterson on Nervous Diseases?

A. I have used the book—used the text book.

Q. What estimate do they make in regard to the proportion?

Mr. Curley: I object to that, if the Court please, on direct examination.

The Court: Objection sustained.

Mr. Elliott: That is all.



## Cross-examination.

By Mr. Curley:

Q. Doctor, this trouble in the brain that you say is caused by an over-production of fluid in one of the lobes, what do you say they call that?

A. It is usually spoke of as hydrocephalis.

Q. Hydrocephalis?

A. Yes.

Q. Is that of syphilitic origin?

A. It may be.

Q. Well, isn't it of syphilitic origin?

A. What is that?

Q. Isn't it of syphilitic origin?

A. I say it may be of syphilitic origin. There are various causes for it, one of which is syphilis.

Q. One of which is syphilis?

A. Yes.

Q. Now, what other causes produce this trouble?

A. Well, I have stated any irritative or inflammatory condition which affects the surfaces in these cavities producing or secreting this fluid may be the cause.

89 Q. From pyæmic conditions, you mean?

A. Any infections condition in which the pyæmic condition is an infections condition, may do so.

Q. Such as syphilis and tuberculosis? The percentage of brain growths arising from pyæmic conditions as compared with those arising from external injuries are inner ear injuries is very slight, is it not?

A. The percentage of growths due to injury and due to other causes—I didn't catch that question then.

Q. Well, I will get at it in another way. You say, Doctor, that brain abscesses are caused by external injuries or a hit on the head.

A. Yes.

Q. Say, about one-fourth to one-half, or cause about one-fourth to one-half of all brain abscesses?

A. Yes sir.

Q. Now, what percent of brain abscesses are caused by inner ear troubles?

A. Well, those are also—the figures also vary in those from—I would say the same—twenty-five to fifty percent. It depends on the location of the abscesses you are speaking about.

Q. Now, doesn't it run higher than that? Isn't it ordinarily considered that about two-fifths of all abscesses of the brain are due to the inner ear?

A. Two-fifths, well, that is from twenty-five to fifty percent.

Q. That is nearly fifty percent.

A. Two-fifths is forty percent.

Q. So that from twenty-five to fifty percent of all brain abscesses are caused by external injury and approximately forty percent are caused by inner ear troubles?



A. Yes, I think that is a fair statement.

Q. Then the balance would be distributed among all the other pyarmic conditions?

A. Yes sir.

Q. That you have mentioned?

A. Yes sir; all the other causes.

Q. In what manner, Doctor, does syphilis most commonly attack the brain?

Mr. Elliott: If the Court please, I think that question is improper cross examination. That was not gone into on direct examination.

The Court: Objection overruled.

The Witness: Your question w-s how does syphilis—

(Question read.)

A. Well, the most common syphilitic process is one attacking the blood vessels of the brain which should be considered in a discussion as a part of the—

Mr. Curley:

Q. Ordinarily is that found—are those troubles found deep in the brain or near the surface?

A. No, they are found throughout the blood vessels of the brain, some of which are on the surface and other—penetrate the substance of the brain.

Q. Isn't it a fact that they most frequently attack the meninges, or the outer portion of the brain, rather than to go in deeply?

90 A. I don't know that there is any difference, I am not familiar with the difference.

Q. In diagnosing a case of abscess of the brain, trying to ascertain its cause, what are the most promising differentiating features in the symptoms of a patient, between one affected with an abscess caused by syphilis or one caused from an outside external injury?

A. Well, of course, in the case of syphilis, you have no history of any injury. You would have that, in the first place. If the patient was coming to you and attempting to give you all the possible information that would lead to a diagnosis, in the first place, there would be no history of the injuries, which, as I have stated before, is one of the strong diagnostic points. The location of the abscess is another. In a case of an injury, you, in the first place, expect to find the abscess close to the point of injury. You expect to find some external evidence of injury, either of the scalp or of the bone, of the skull, and then evidence of inflammation, or sometimes inflammation elsewhere, and fever and rapid pulse, which you would look for. In syphilis you would find none of those conditions. In addition you would hope to get a history of syphilis, although many people have syphilis without knowing it. They may have had congenital syphilis. They may never have acquired it themselves.

Q. Isn't there any prominent symptoms differentiating between the two classes of abscess that would be readily noticeable in getting the history of his case, as to the way he would *fell*?

A. You are talking about an abscess following syphilis?

Q. Syphilis, syphilitic growth in the brain.

A. Syphilitic growth is what is known as a gumma, gummatas condition in the brain or the heart. To start with, or when it has developed — is a hard mass of tissue which gives no signs of abscess or simulating abscess, except possibly pressure symptoms. In the case of an abscess you would have pressure symptoms and in the case of syphilitic gumma you would have pressure symptoms. Then if the syphilitic process broke down and softened, which it might do, by the circulation being cut off by the syphilitic process, the areas which I spoke of before being involved, then a syphilitic growth would have been softened and you would get an accumulation of liquified material. But that wouldn't give any inflammation; it wouldn't give fever. It wouldn't give rapidity of pulse, or chills. In a case of abscess I would say you would look for it, unless in the case of the gumma where a secondary infection developed or appeared or came from somewhere else and attacked this low-grade tissue. This gummatous tissue is at low vitality and is very readily attacked by germs floating around in the blood. In that case you would have an abscess which could not be distinguished from any other abscesses.

Q. A stroke upon the head might produce a condition that would cause that to result in an abscess, might it not?

A. The stroke on the head might injure the—injure the gummatous tissue, the syphilitic tissue, just as it might injure the other brain tissue.

Q. Otherwise, the gumma would probably not be noticeable at all; its existence there?

A. Well, except the fact it is a growth and it is practically a tumor, and you would get the signs of tumor and pressure.

91 Q. Well, now, to your mind then, as far as an examination of the patient is concerned, as to his symptoms, there is no prominent symptom that of your mind would cause you to reach a conclusion as to whether the abscess was one of syphilitic origin or was caused by a stroke on the head?

A. Well, if the man presented the signs of an abscess, which are fever, and chills and elevation of pulse, and the same as inflammation anywhere else, you would not think of syphilis as being the cause, as being the most probable cause.

Q. Assuming that a man working in a mine in a tunnel was struck on the head by a flat stone with sufficient force to knock him down and render him unconscious for some five, ten, or fifteen minutes, but from which he recovered and experiences no further inconvenience other than the natural soreness resulting from such a blow, for four or five days, or probably a week, and assuming in about four or five days, or probably a week thereafter he begins to experience dizziness when walking and staggering unsteadily, which condition continues to grow gradually worse for approximately two weeks, when he is unable to longer continue work on account of such condition; and assuming that in about five or six weeks thereafter he is operated upon for an abscess of the brain, and an abscess is located and opened within a short distance, say, three or four inches of the place of injury; and assuming that he had theretofore been

in good health and had not within several years prior to such illness experienced any other injury or any other illness of any character to his knowledge; what in your opinion would have been the cause of that abscess?

A. Assuming all those things, I should think that the injury was a very strong possibility that the injury was the cause.

Q. You would have diagnosed it as such under those circumstances?

A. I should have diagnosed that as the most probable cause.

Q. If from his history it appears that he had not suffered any illness such as syphilis or typhoid, or diseases of that kind, that would bring about a pyaemic condition, about the next thing you would look at would be his ear, wouldn't you, to see if he had any inner ear trouble.

A. I should always examine the ear.

Q. That would be one of the first things you would think about?

A. Yes sir.

Q. Because the greatest number of abscesses probably are due to inner ear trouble.

A. Yes, that is one of the most common causes.

Q. Now, you say, Doctor, that the trouble in the brain by reason of the clogging up of the passage of this fluid that you have spoken of may be due to any condition that would clog it up?

A. Yes.

Q. It isn't the existence of the fluid there that causes the trouble, as I understand?

A. No.

Q. But it is preventing that fluid from circulating around through the lobes of the brain, is that right?

A. Yes.

Q. Well, now, supposing that a man receives a blow on the head sufficiently heavy to cause the bursting of some of the little blood vessels in his brain, would it be possible for that blood clot  
92 to bring about this condition that you have mentioned?

A. Well, it would depend entirely upon where the blood clot was.

Q. I know, but if it were in the right place it would produce such a condition?

A. A blood clot would, until it was absorbed, produce a plugging.

Q. Suppose, Doctor, that a man should come to you under the conditions that I have heretofore stated in my hypothetical question, and you diagnosed his case from the symptoms as being an ulcer of the brain, and suppose that he were suffering with constant headache throughout his brain, would that have any significance in diagnosing the character of ulcer that he was suffering with?

A. Character of abscess you mean?

Q. Yes, character of abscess.

A. Your question was assuming that this previous history——

Q. Yes, that you have concluded that it is an abscess.

A. Yes.

Q. Now, would that condition indicate to you the character of the abscess, whether it was caused from a syphilitic condition or whether from a stroke on the head?

A. Well, in other words, assuming that there was no other cause evident which—

Q. From which you would draw your conclusion as to the character of abscess.

A. Well, as you stated the question, there was no other cause present, you would necessarily have to diagnose it as trauma. That is the way you place the question.

Q. No, you misunderstand me. A man comes to you and you diagnose his case from his condition as an abscess of the brain.

A. Yes.

Q. Now, would the fact that he was complaining—

The Court: Pardon me, does *the* presuppose that he gives a history?

Mr. Curley:

Q. From the history, that you have diagnosed it as an abscess but are not sure as to the character of abscess or just what caused it, would the fact that he was suffering more or less constantly from a brain headache be in any manner indicative to you as to the character of abscess or as to what was the cause of it?

A. Absolutely not.

Q. That wouldn't make any difference?

A. No, absolutely not.

Q. Now, isn't it a fact that one of the most prominent symptoms frequently differentiating between syphilitic growths and other brain abscesses is the circumscribed limitation of the pain?

A. Not to my knowledge. Any intra-cranial pressure from any cause whatsoever would cause headache, and it is impossible to tell without other evidence what the cause of the headache is.

Q. Then, so far as you know, that is not a differentiating symptom?

A. It is not.

93 Q. Between the two. Are you acquainted with Bangs-Hardway's text book, American text-book on Syphilis and Diseases of the Skin?

A. I am not.

Q. You are not?

A. I have never opened the book as far as I know.

Q. You don't know whether that is a recognized text-book on that subject or not?

A. Bangs-Hardway—I know of the book as being a—yes, it is a recognized text-book.

Q. It is a recognized text-book?

A. Yes.

Q. Well, now, if it is set out in this Bangs-Hardway that the headache of a syphilitic growth—that one circumstance very often differentiating the pain of syphilitic growths from the headache

caused by other tumors is that—is a circumscribed limitation of the pain, would you say that that is a correct statement or not?

A. That the circumscribed—

Q. Limitation of the pain.

A. So far as I know, a circumscribed limitation of pain occurs in other conditions aside from syphilis.

Q. In other words, if there were a circumscribed limitation of the pain, that would indicate to you that the abscess was one other than of syphilitic origin?

A. No, I don't state that.

Q. I misunderstood you, then.

A. I stated that to me it would not—to me it would not indicate necessarily syphilitic conditions.

Q. If there were a circumscribed limitation?

A. No.

Q. Then you don't agree with this statement?

A. I do not.

Q. Do you know of any other feature, Doctor, that is prominently noticeable in cases of syphilitic growths inside the skull?

A. You mean any feature that distinguishes syphilitic from other growths?

Q. Yes.

A. I couldn't differentiate or distinguish without a history of possibly syphilitic infection.

Q. Isn't it a fact that a man suffering from a syphilitic growth in the brain, that is always worse at nights?

A. Not to my knowledge.

Q. Then if Bangs-Hardway so stated you differ with them again?

Mr. McFarland: If the Court please, just a moment. That comes within the rule that the Court has established on that subject, and I object to it.

The Court: Yes I think the same ruling applies.

Mr. Curley: In cross examination as in direct examination?

The Court: Yes, because, if you were to invoke that rule as against the defendant only, the plaintiff on cross examination could read half the medical books on the subject by propounding questions and quoting authors.

Mr. Curley: There is a great deal of difference, if your Honor please, in testing an expert witness by his use of a text-book, and trying to introduce before the jury the contents of the  
94 text-book by reading it to him. The purpose here is simply to test the knowledge of this witness.

The Court: In testing his knowledge you are reading from a book, reading to the jury.

Mr. Curley: From what he says is a recognized text-book upon the subject.

The Court: Yes, there is no question about that, but you are reading that book to the jury by asking your question, and I do not know of any rule which would allow the plaintiff on cross examination to introduce these medical books and not allow the defendant to

do it. The question has been passed upon. Go ahead. I am satisfied with the correctness of that ruling.

Mr. Curley:

Q. Are there any other distinguishing features, Doctor, to your knowledge, between abscesses due to direct infection and those resulting from pyæmic states and from virulent thoracic conditions?

A. No, nothing except previous history. There is no way of distinguishing except by previous history of the case.

Q. Isn't it a fact that abscesses due to direct infection are ordinarily single?

A. Yes, they are.

Q. And isn't it a fact that abscesses resulting from pyæmic states and from virulent thoracic conditions are usually multiple?

A. I should say not usually; they may be multiple.

Q. Aren't they usually multiple?

A. I am not aware that is the case. It is perfectly comprehensible that they may be multiple.

Q. Doctor, where would you expect to find an abscess caused by inner ear disease?

A. It would be most probably directly in from the ear, over the area of the brain known as the temporal lobe, and later gravitating backwards to the cerebellum.

Q. Would you find it in the cerebrum of the cerebellum?

A. Most probably in the cerebellum.

Q. Most probably in the cerebellum?

A. Yes.

Q. Abscesses in the ear?

Q. Yes. This might—you might have the same condition—might have the infection carried from the process in the middle ear, and being anywhere in the brain. It might be carried through the blood stream and distributed equally. It might be in one spot, which it usually is, or it might be in a dozen spots.

Q. But you would expect most probably to find it in the cerebellum?

A. Most probably.

Q. Now state to the jury where the cerebellum—what part of the brain that is.

A. Well, the cerebellum is the portion of the brain situated just—a portion of the skull situated just above the neck inside the skull cavity, and just above the neck at the base of the brain. It occupies a separate cavity there, and there are tough fibrous walls or partitions which divide it from the other larger lobes known as the anterior brain or cerebrum.

95 Q. So, Doctor, there is really no connection between the point or cause of an abscess in the brain and the real location of the abscess?

A. Oh, yes, there is. The abscess is usually—following an injury, you stated?

Q. No, I am saying for any reason.

A. Yes, there is. If the cause—if, for instance, the cause is an

injury, the abscess is usually located right beneath the point of injury. If it is due to infection from the ear, it is usually directly in from the ear, going right straight through the skull in locating that abscess. If it is from a blood stream, brought from somewhere else, from an infected arm or infected lung, or elsewhere, it may be located anywhere in the brain. It may be, as I say, in a dozen different places, dozen different locations.

The Court: This is the correct rule of law we had up a few moments ago. (Reading.)

"It would be a mere invasion of the general rule under discussion if counsel were allowed on cross examination to read to the witness portions of such works and to ask if he concurred in or differed from the opinions therein expressed. Hence, it is not allowed."

Mr. Carley: I think that is all.

Redirect examination.

By Mr. Elliott:

Q. Doctor, where would you expect to find an abscess which was caused by a blow on the head, on the outside of the brain or on the inside, on the cortex or on the inside?

A. I would expect to find it in the cortex, either directly under the skull or in the brain tissue underlying the point of injury.

Q. You would not expect to find it in a ventricle?

A. How?

Q. You would not expect to find it in a ventricle?

A. No, that would be the last place I would usually expect to find it.

Q. What would you say as to the character of a blow, as to its severity, on the head, which would set up an abscess in a ventricle?

A. Well, the probabilities—that would set up an abscess in the ventricle?

Q. Yes.

A. Well, it would have to be an extremely severe injury.

Q. How as to incapacitating the victim?

A. Oh, I should expect it would be practically a fatal injury, or the man would be in a very—would be a very sick man.

Q. Would he be able to walk around within fifteen or twenty minutes following such an injury in your opinion?

A. No.

Q. And continue to work fourteen, fifteen or sixteen days thereafter?

A. If not killed at once, I should expect him to be immediately incapacitated.

Mr. Elliott: That is all.

96 Q. That is, in a case where an abscess was set up in a ventricle of the brain?

A. Yes.

Mr. Elliott: That is all.



## Recross-examination.

By Mr. Curley:

Q. Any blow, Doctor, that would cause a bursting of one of the small blood vessels of the brain would produce that condition, though, wouldn't it?

A. Produce a bursting of the blood vessel where?

Q. In the brain, in the ventricle, in the lobe?

A. In the ventricle?

Q. If the blow was sufficient.

A. You say in the ventricle or in the lobe. Of course, they are entirely different.

Q. In the ventricle.

A. Well, an injury that would cause a bursting of a blood vessel in the ventricle would have to be, as I stated before, an incapacitating injury.

Q. I am not asking you that. I say if the blow caused the bursting of any of the small blood vessels, it might produce an abscess of the brain.

A. It might.

Mr. Elliott:

Q. It would be the last place where you would expect a blood vessel to burst, in a cavity?

A. Yes.

Q. And if it did burst it would necessitate a mighty serious, severe incapacitating blow?

A. A very severe one.

Mr. Elliott: That is all.

Mr. Curley:

Q. But severe or otherwise, if it did burst the blood vessels it would produce abscess.

A. It would not necessarily produce abscess.

Q. It could produce it?

A. It could produce an abscess. It would produce a hemorrhage which might become infected and produce an abscess.

Q. In other words, that is one of the conditions that would result?

A. That is one of the possibilities that would result.

Mr. Elliott:

Q. Isn't it very likely that a hemorrhage of the left lateral ventricle would be fatal?

A. Well, not necessarily the hemorrhage, but the injury accompanying—the injury to other portions of the brain accompanying a blow sufficient to cause a hemorrhage in the ventricle would probably produce death.

Mr. Curley: Not necessarily so.

The Court: That is all, you are excused, Doctor.



97 G. E. GOODRICH, M. D., called as a witness on behalf of the defendant herein, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Elliott:

Q. State your name, Doctor?

A. G. E. Goodrich.

Q. What is your profession?

A. Physician and surgeon.

Q. Where do you reside, Doctor?

A. Morenci, Arizona.

Q. Do you know Richard Bray, the plaintiff here?

A. Yes sir.

Q. Do you know the Arizona Copper Company, Limited?

A. Yes sir.

Q. I will ask you if you had occasion to make any examination of Richard Bray, the plaintiff here, prior to his going to work for the Arizona Copper Company?

A. Yes, I examined him.

Q. What was the nature of that examination?

A. Why, it is a routine examination made of all employees prior to going to work—a very superficial examination.

Q. What was its character? What do you do?

A. Well, that depends on the time that we have to make it. These men come up during office hours, and often perhaps there may be ten or a dozen of fifteen. We only ask them a few questions relative to their general health.

Q. What are the particular things to which this examination is directed?

A. The idea——

Mr. Curley: I object to that, if your Honor please. It has no place here. It is a question of whether he made an examination of the plaintiff and of what it consisted.

Mr. Kearney: Further, the relation of physician and patient I think will exist, and we further object to it on the ground of being privileged.

Mr. McFarland: If your Honor please, there is no relation of physician and patient in this case. He was not treating him, or called upon to treat him by Mr. Bray.

The Court: I don't understand. One counsel objects to it and that other says he should go on and tell it. Now, which objection shall I consider?

Mr. Curley: Consider them both. It is just another objection. Mr. Kearney simply added another objection to mine.

Mr. McFarland: Well, I say the objections are not tenable for the reason that the relation of physician and patient does not or did not exist. He was not called upon to treat him and never did treat him. We simply want to know his condition at that time, and what this ex-

amination covered, the extent of the examination. I do not think that comes within the rule generally, or even the rule as laid down by the Supreme Court of the United States in the Clark case. That relation must exist in order to be privileged, and could not exist

98 where one voluntarily submitted himself to an examination with a view to employment. That is not treatment.

Mr. Elliott. The further purpose of that examination, your Honor, is to apprise the employer of the condition of the person who is examined—to enable that person to determine whether he is going to hire him or not. The very purpose of it is to pass on what the doctor knows.

The Court: I will overrule the objection.

Mr. Curley: I think the reading of the question will show that it is irrelevant.

(Question read.)

Mr. Curley: That is the question I am objecting to. He hasn't been asked yet, "did you make an examination," or "Of what did that consist," or anything of the kind; but generally, what generally were the things to which it was directed.

The Court: No, I understood counsel to direct it to the examination to be made of this particular individual.

Mr. Curley: It isn't though.

The Court: If it isn't, I will sustain the objection to it.

Mr. Curley: That is my objection.

The Court: As to what examination he makes of other employees is immaterial.

Mr. Elliott:

Q. Was your examination, Doctor Goodrich, of this plaintiff, Mr. Bray, of such a character as would enable you to discover any particular mental or nervous disease that Mr. Bray might have been afflicted with?

A. No, it would not.

Q. What was the extent of your examination of Mr. Bray?

A. It extended to asking him regarding his general health, if he had a rupture, if he had ever had tuberculosis, or chronic colds, if he knew whether he had any trouble with his heart. That is about the extent of the examination of all employees.

Q. Tuberculosis of what, any particular—pulmonary?

A. Pulmonary type.

Q. Then such an examination is not calculated—does not extend far enough to discover any particular latent mental or nervous disease that might be present?

A. No, it would not discover—you couldn't discover any obscure disease by the examination we made.

Mr. Elliott: That is all.

Mr. Curley: That is all.

Mr. Elliott: We will call Doctor Rodgers.

99 MARK A. RODGERS, M. D., called as a witness on behalf of the defendant herein, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Elliott:

Q. State your name, Doctor.

A. Mark A. Rodgers.

Q. Where do you reside?

A. Tucson.

Q. Your profession?

A. Physician and surgeon.

Mr. Curley: We will admit the Doctor is disqualified.

Mr. Elliott:

Q. What, if any, institution are you connected with in Tucson?

A. Well, I am not directly connected with any now, except in a general way.

Q. Is there any particular limit, Doctor, any point of time of the developing of a brain abscess?

A. No, there is not limit, if I understand your question correctly I would say there would be no definite limit.

Q. A cause for an abscess might be set up, and that abscess might lie dormant or latent, or be developing over a period of a great many years?

A. Yes.

Q. As many as ten?

A. I presume so, but certainly for years.

Q. And such an abscess, under certain conditions, might be so developing and you not know that it was present?

A. It would give no symptoms; it wouldn't necessarily give symptoms.

Q. Until some stage in the process of development was reached where it was lighted up?

A. Yes.

Q. In your opinion and from your knowledge, can you state that the pus or contents of abscesses vary as to consistency, as to its being thick or thin, according to the length of time the abscess had been forming or running?

A. It is stated—I cannot say from personal experience, but I have read the statement as to the color and the consistency of the contents of brain abscesses, new and old.

Q. Describe the consistency of the contents of an abscess or abscesses with respect to their different ages, new and old?

A. In a new abscess you would expect to have the characteristics of fluid which would be the result of the traumatism, in case it were produced by a traumatism. In an old abscess, those conditions would disappear. It is stated with regard to brain abscesses that the longer the abscess exists the more apt the fluid is to become liquid—

the more apt the contents of the abscess is to become liquefied. It is stated by some authors—I have read the statement by some authors that it does not—that that rule does not necessarily follow. There are cases in which the substance remained thin, but in others it is stated that the contents of the abscess may be thick.

Q. Then would you think that in your opinion, where a thin fluid, a very thin pus is drained, that that thin consistency of the pus would indicate a long-standing abscess?

A. It would be more apt to indicate a long-standing, provided it is pus.

100 Q. I did not understand.

A. Provided it is pus.

Q. It is pus?

A. Yes; a thin fluid is not necessarily pus.

Q. I will base my question upon it being pus. If you had a case in which you found a collection of pus in the left lateral ventricle, would you be sure that you were dealing with an abscess of the brain at all?

A. I should first question that very decidedly.

Q. I did not understand your answer.

A. I should first question that very decidedly.

Q. Might it not be due to a diseased condition of the ventricle?

A. Yes.

Mr. Elliott: That is all.

Cross-examination.

By Mr. Curley:

Q. Doctor, what did you say your opinion is of the character of pus with reference to the age of the abscess?

A. It is more apt to be thin as time goes on.

Q. More apt to be thick?

A. Thin as time goes on.

Q. Do you mean that?

A. I certainly mean that; yes sir.

Q. You say you have read that such is the case?

A. I have read that, and I have experienced it in my own experience.

Q. You stated awhile ago that you had read that.

A. Yes.

Q. Now what books have you read that stated that?

A. Well, now, I cannot state definitely what authority, but I have seen that definitely stated in one of the well known authorities, either Osler or some other authority that I have read.

Q. Have you read Church & Peterson on Nervous and Mental Diseases?

A. No, I couldn't get that because the attorneys for the defense seemed to have it all the time.

Q. Because I had it?

A. Yes.

Q. You haven't read that?

A. No, I have not.

Q. You don't know what Church & Peterson says on that?

A. No, I can't say anything about it.

Q. That is a recognized authority?

A. Not that I know of.

Q. Oh, you don't know?

A. No, I don't know that it is.

Q. Why were you so anxious to get it?

A. Well, I wanted to see what you were reading?

Q. Did you know that I had the book when you started to look for it?

A. Yes, I saw you with it, yes.

Q. Didn't you go down to the Rodgers Hospital and try to find the book before you found I had it?

A. Afterwards. I first saw you with it.

Q. Did you know, as a matter of fact, that I had the book at that time?

A. Yes sir; I saw you with it.

Q. Prior to the time that you were down there looking for it?

A. Yes sir.

Q. You saw me with it?

A. Yes.

Mr. Curley: That is all.

101 Redirect examination:

By Mr. Elliott:

Q. Doctor, isn't it a fact that you wanted to be sure on that point and you did look up an authority on it?

A. Yes, I found that to be the case.

Q. You looked it up thoroughly?

A. Yes.

Mr. Elliott: That is all.

NOAH GREEN, called as a witness on behalf of the defendant herein, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Elliott:

Q. Give your full name to the Reporter, Mr. Green.

A. Noah Green.

Q. Where do you reside now?

— Bisbee, Arizona.

Q. What is your occupation?

A. Miner.

Q. Where are you pursuing that occupation at the present time?

A. For the Copper Queen Mining Company in Bisbee.

Q. In Bisbee, Arizona?

A. Bisbee Arizona.

Q. Do you know the plaintiff here, Richard Bray?

A. I do.

Q. Do you know the Arizona Copper Company, Limited the defendant here?

A. I do.

Q. Were you at any time in the employ of the Arizona Copper Company, Limited?

A. I was.

Q. Where?

A. Morenci, Arizona.

Q. Speak toward the jury and a little louder, Mr. Green, please. Were you employed by the defendant company?

A. I was.

Q. Where?

A. Morenci.

Q. In what capacity?

A. As a miner.

Q. Did you know the plaintiff, Richard Bray, in Morenci, Arizona?

A. I did.

Q. Under what circumstances did you know him?

A. Why, he was timberman.

Mr. Curley: Speak up, Mr. Green, so we can hear you.

A. He was timberman in the Humboldt Mine, Morenci, Arizona.

Mr. Elliott:

Q. Did you do any work with him?

A. I did.

Q. How long did you work with him?

A. Well, about three or four weeks.

Q. Do you know how long Mr. Bray was in Morenci and working for the Arizona Copper Company?

A. Well, I don't know how long he was there before he went to work for this company, but from the time they started work there—with me, he was there about a month, I should judge.

Q. Mr. Bray has testified that he had a helper who worked  
102 with him all the time, he worked in Morenci, as a timberman, and that that helper's name was Noah Green. Are you that person?

A. I am.

Q. I will ask you to state, Mr. Green, if you ever saw this plaintiff, Richard Bray, sustain an injury while working for this defendant company, and while you were working with him, by being struck with a rock, a rock falling and striking Mr. Bray upon the head, knocking him down and rendering him unconscious for a period of five or ten minutes?

A. I did not see him at the time that he was struck. My back was turned to Mr. Bray, and when he was struck he made some exclamation and called my attention. I turned around and Mr.

Bray was—seemed to be staggering around and seemed to be dazed, and I went to Mr. Bray and I asked him if he was badly hurt, and he—if I remember right, he said that he would be all right in a few minutes, or something like that, and in five or ten minutes he seemed to get better, and he went on and finished the shift.

Q. I asked you if you ever saw Mr. Bray struck on the head with a rock and rendered unconscious, knocked down on the ground?

A. I didn't see him struck.

Q. Did you see him lying on the ground unconscious?

A. I did not.

Q. Did you observe any wound or cuts in Mr. Bray's head?

A. I did not.

Q. Did he direct your attention, or did you direct his attention to any blood flowing from his head?

A. I don't remember of anything like that.

Q. At what time of the day was it, of this shift that you saw Mr. Bray stagger, as you testified?

A. Well, I am not exactly sure of the time, but I should judge it was about nine or ten o'clock in the morning.

Q. About nine of ten in the morning?

A. Along about that time.

Q. Are you positive that it was not just before going off shift in the afternoon?

A. Oh, I could not be positive about that.

Q. Was it when you were going off shift in the afternoon? What time did you go off shift, on the day shift?

A. Three thirty.

Q. Did this accident occur before or after lunch?

A. Well, I don't remember that.

Q. Your recollection is that it occurred in the morning?

A. In the morning, but I am not positive of that.

Q. Did you see Richard Bray fall down?

A. No.

Q. You didn't. Did you rush to his aid and pick him up, and as he says, place him to sit down on a log and ask him what was the matter?

A. No.

Q. You found no cut in Richard Bray's head?

A. No.

Q. I will ask you, Mr. Green, did you assist Mr. Bray outside of that tunnel in which you were working, and did you outside of that tunnel in the company of Mr. Bray meet a man by the name of William Jane?

A. I don't remember of anything.

Q. And did you then at any such meeting or any meeting with William Jane, in which you and Mr. Bray and William Jane were present, tell William Jane that you had seen Richard Bray struck on the head with a rock and rendered unconscious for a considerable period?

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Mr. Curley: Just a moment. I object to that. The witness says

he does not remember whether he was out there with those parties or not.

The Court: The objection is overruled, to the question as asked.

Mr. Curley: The former question, if your Honor please—in answer to it, he says, "I don't remember." The question was "When you went out side did you meet Mr. Jane out there," and he said "I don't remember."

The Court: Well, they may call his attention to the fact.

(Question read.)

A. I did not.

Mr. Elliott: No such conversation ever took place? You never made such a statement?

A. No.

Q. Of your knowledge, Mr. Green, is the statement of Mr. Bray that after he was knocked down and rendered unconscious, and after he had recovered his consciousness, that you placed him to sit down on a piece of timber and felt of his head, examined him and asked him if he was badly hurt, true or untrue?

The Court: Although there is no objection to that question, I think it is improper. One witness should not be called upon to state whether or not another witness has falsified. He may state whether or not he did that.

Mr. Elliott:

Q. Did you do that, Mr. Green?

A. Well, I didn't do it, but I asked Mr. Bray, as I said a while ago, I asked him if he was hurt, *be* he was not unconscious.

Q. He was no- unconscious?

A. No, as I said awhile ago.

Q. Did you see him knocked down or lying down on the ground?

A. No.

Q. Did you rush to his aid and pick him up and place him to sit down on a log?

A. I went to him when I turned around and I saw him staggering, but he sat down on a piece of timber of some kind that was around close.

Q. Did you place him there?

A. I helped him to his seat.

Q. How soon did Mr. Bray at any time before or after that complain of dizziness?

A. If I remember right, it was two or three days.

Mr. Curley:

Q. After that?

Mr. Elliott:

104 Q. How long did Mr. Bray work after this incident that you have described here?

A. Well, I couldn't be positive about the time. It might have been two or three days—four or five.



Q. Was it two weeks or more?

A. I don't remember if it was.

Q. What, is any, statement did Mr. Bray make to you regarding what he thought was the cause of his dizziness?

A. Well, at one time Mr. Bray and I were talking. It was when he was complaining of feeling sick and the way he was, dizziness, and one morning, I remember, he says to me, he says, "I believe it is the sulphur smoke." The sulphur smoke was awful bad around that morning.

Q. Did you hear or see any rock fall and strike Mr. Bray?

A. No.

Q. How did Bray get out that evening after this incident that you speak of?

A. Well, I don't remember exactly, but he walked out. I don't remember of assisting him, or anything like that, out.

Q. Were you subpoenaed by the plaintiff in this case?

A. I was.

Q. I will ask you, Mr. Green, did you see Bray lying unconscious on the ground there in that drift?

Mr. Curley: I object to that. It has been answered twice before.

The Court: He said he did not. That has been answered.

Mr. Elliott:

Q. You saw nothing fall or strike Bray?

A. No.

Q. You heard nothing fall or strike him?

A. No.

Q. How close were you to him?

A. Well, five or six feet.

Q. Five or six feet?

A. Yes sir.

Mr. Elliott: That is all.

Cross-examination.

By Mr. Kearney:

Q. You do remember of seeing him stagger, don't you, there?

A. I do.

Q. And you did assist him—you did hear him remark that he was struck on the head, didn't you?

A. I did.

Q. And you did assist him, didn't you?

A. I assisted him went to him and asked him if he was badly hurt, and I assisted him to a seat.

Q. He was stunned, wasn't he?

A. He seemed to be stunned, dazed.

Q. And you helped him to a log to sit down, didn't you?

A. Yes.

Q. You didn't make an examination of his head, did you?

A. No.

Q. You didn't make an examination of his head?

A. No.

Q. Now, isn't it a fact, Mr. Green that you don't remember very clearly what did happen? Ain't there lots of things that you have forgotten that happened there?

A. Well there are some things that are not exactly clear.

Q. I will ask you if you weren't examined in Mr. Curley's office Wednesday morning before Mr. Curley and myself, and a stenographer there, and questions asked you?

105 A. Mr. Curley asked me a few questions there.

Q. Yes, sir. I will ask you if this question wasn't then and there asked you, "Did you make an examination of his head," and didn't you then and there answer, "Yes, sir: I don't remember whether I did or not"?

A. Well, I just told you awhile ago that I didn't examine his head.

Q. And was the following question asked you, "A great many things happened in the mine, so you don't remember all things clearly," and your answer was "No, sir." Didn't you so answer?

Mr. McFarland: What are you reading from, Mr. Kearney?

Mr. Kearney: I am reading from his testimony.

Mr. McFarland: This witness's testimony?

Mr. Kearney: Yes, sir.

Mr. McFarland: Where was it taken?

Mr. Kearney: Taken by a stenographer in Mr. Curley's office.

Q. Didn't you make that answer to that question?

Mr. McFarland: If the Court please, I object to that, if he made the statement to Mr. Curley. I understand that is what he is reading from—a conversation between him and the witness. I object to it. I don't know, and I don't know whether the Court knows what he is reading from, and under what circumstances these answers were made.

Mr. Kearney: I am just asking him if he made such answers.

The Court: Well, counsel stated—I suppose you did not hear it—that this witness was in Mr. Curley's office and that either Mr. Curley or Mr. Kearney asked him some questions and the questions and answers were taken down by a stenographer, and he is repeating to him certain questions and certain purported answers and asking him whether or not he made those answers.

The Witness: Will I answer that question?

Mr. Curley:

Q. You made that statement?

A. I believe I did.

Q. You did?

A. That—

Mr. Kearney:

Q. "You didn't think so much of the matter—

The Court: I think you had better ask him if the following ques-

tion wasn't asked and the following answer given, because you are simply reading what took place there, and the witness ought to know what was read.

Mr. Kearney:

Q. I will ask you if the following question was not asked you, and didn't you make the following answer: "Q. You didn't think so much of the matter? It passed out of your recollection."

106 And you answered, "Yes it passed out of my recollection"?

The Court: The question is did you or not make that statement in Mr. Curley's office.

A. I did.

Mr. Kearney:

Q. The following question was asked you and to which you make the following answer and I will ask you if you did so make it——

The Court: I decline to allow you——

Mr. Kearney: I beg your pardon.

The Court: I say I decline to allow you to examine this witness any further with reference to that conversation unless you put the questions—not read from the testimony, but put questions as you did before. Counsel have no right to say to a witness, "you said this, that or the other," because it makes counsel a witness.

Mr. Curley: That is all.

Mr. Kearney: That is all, Mr. Green.

The Court: Any redirect examination?

Mr. Elliott: That is all. That is our case, your Honor.

The Court: Anything in rebuttal?

Mr. Curley: We will recall Mr. Bray.

RICHARD BRAY, the plaintiff herein, recalled as a witness in his own behalf in rebuttal, having been previously sworn, further testified as follows:

Direct examination.

By Mr. Curley:

Q. Mr. Bray, you heard the testimony of Mr. Williams in which he said that he came to see you one evening, and in talking about the cause of your illness, you told him that you had a little stroke on the back of the head with a rock at some time. Did you have any such conversation?

A. I never told him that at all.

Q. You never had such a conversation?

A. I don't remember no such talk.

Q. Did you have any conversation such as related by Mr. Noah Green in the shaft or in the tunnel in which you were working, in the Humboldt Mine, where you told Mr. Green that you thought your sickness was caused by sulphur smoke?

A. No, sir.

Q. Was there any sulphur smoke in those workings at all?

A. No, sir.

Mr. Curley: That is all.

107 Cross-examination.

By Mr. Elliott:

Q. There is a good deal of sulphur smoke around town around Morenci, though, isn't there?

A. There is some around town.

Q. There is a good deal there, isn't there?

A. There is none in the mine, though.

Q. No, of course not, but there is down at the smelter and around the town.

A. Yes.

Q. Do you live down in the mine or do you live on top?

A. I live on top.

Mr. Elliott: That is all.

I. E. HUFFMAN, M. D., recalled on behalf of the plaintiff in rebuttal, further testified as follows:

Direct examination.

By Mr. Curley:

Q. Doctor Huffman, you heard the testimony of Doctor Rodgers in which he said that in new abscesses pus would be thick and in old abscesses it would be thin?

A. I did.

Q. Do you agree with the doctor upon that?

A. No, I do not, speaking of brain abscesses.

Q. Brain abscesses. Doctor, what is the condition of the pus in abscesses with reference to the age of an abscess?

A. Well, in abscesses, especially in the ventricle, would be—a recent abscess would be mixed probably a great deal more or less with the cerebro-spinal fluid, which is a fluid, and which would naturally be thin in a recent abscess.

Q. As the abscess ages, Doctor, what transformation is worked about in the character of the fluid?

A. Well, it would probably thicken as the addition to pus cells—lococytes, dead lococytes would be added, and would probably become more thickened and viscid.

Q. Apt to become more yellowish or greenish in color as it would get older?

A. Probably would.

Q. And become offensive?

A. Liable to, very liable to.

Q. Doctor, I will ask you to state whether or not Doctor Rodgers was mistaken about my having Church & Peterson on Mental and Nervous Diseases at the time he was searching for it in the Rodgers Hospital?

Mr. McFarland: If the Court, please, I object to his testifying as to Doctor Rodgers being right or wrong in his supposition.

The Court: That isn't the question he is asking.

Mr. McFarland: I so understood it.

The Court: No, he is asking the witness whether or not he was mistaken as to Mr. Curley having that book at a certain time.

108 A. He was.

Mr. Curley:

Q. Where was the book at that time?

A. In my desk.

Juror Moore:

Q. Where was it?

A. In my desk.

Juror Haskins:

Q. At the time he was searching for it, it was on your desk?

A. In my desk.

Mr. Elliott: In your desk.

Mr. Curley: I got the book afterwards.

Mr. Elliott: You still have it?

Mr. Curley: I still have it.

Mr. Elliott:

Q. Did you ever hear of injuries to the head being given as a cause for pus in the ventricles?

Mr. Curley: I object to that.

The Court: Read the question.

(Question read.)

The Court: Objection sustained.

Mr. Elliott: That is all.

The Court: Go to the jury.

Mr. McFarland: The defendant, in the presence of the Court and jury, before the jury has retired to consider of their verdict, moves the Court to direct the jury to return a verdict for the defendant on the following grounds:

First: because the evidence in the cause fails to show that the blow caused the abscess in plaintiff's brain.

Second, because from all the evidence in the cause a verdict and judgment should be for the defendant;

Third, admitting that plaintiff has established his case, as alleged in his complaint, he is not entitled to a verdict because the Employers' Liability Act, on which this action is based, is unconstitutional in this: That said Act is in conflict with the Fourteenth Amendment of the Constitution of the United States which declares that no one shall be deprived of his life, liberty or property without due process of law; that the taking of property without fault is expressly prohibited under the Fourteenth Amendment;

Fourth, because the evidence in the cause shows that the accident and resulting injury was caused by plaintiff's own negligence.

The Court: Motion denied.

(Arguments to jury.)

109       The Court: Gentlemen of the jury, both parties are willing that you may separate until the morning. Therefore, I will not deliver the charge to you until that time, so that my interpretation of the law may be fresh in your minds at the time of the consideration of the case.

Now any misconduct on your part might cause a retrial of this case from the very beginning. And when I speak of misconduct, I do not mean any intentional misconduct, because I know you well enough to know that there would be no such misconduct. But you are to be careful not to violate any of the rules of the court, or violate the law unintentionally. That is, you must not under any consideration discuss this case even among yourselves between now and the time that you go into the jury room tomorrow morning. If two of you happen to meet you must not mention this case, or any subject connected therewith. You should not permit anyone to discuss it in your presence and hearing. Should anyone attempt to do so, it would be your duty to inform him that you are one of the jurors impaneled and selected to pass upon this case, and that he must not discuss it in your presence or hearing. Now, if such a one should persist in doing that, after being so warned, then it would be your sworn duty to report such a one to the court, because he would be guilty of contempt of court. I hope the time will come when a man will be just as free to discuss the facts of a case in the presence of a juror who has been selected to try it, as he would be to go to the judge and attempt to discuss the facts of the case with him. It is just as much a reflection upon your honor and your integrity, as it would be upon mine, or any other judge, who is sworn to administer the law.

Now, you must not read any newspaper accounts of this trial. Of course, I will not know whether you have or not, except that I have implicit confidence in your, and when I permit you to separate I shall rely upon you not to read any accounts, short or long, of this case, or any comments upon it at all. Every impression that you get of the facts of this case, or any subject connected therewith, should be gained here in the court room from the witnesses and the counsel and the court.

Now with these instructions you will be permitted to separate until tomorrow morning at half-past nine, at which time I will give you the charge, and you may retire and deliberate.

Court will be at recess until tomorrow morning at 9:30.

The COURT: Gentlemen of the jury, this is an action brought by Richard Bray against the Arizona Copper Company to recover from said company the sum of \$50,000 as damages for alleged personal injuries sustained by the plaintiff while in the employ of the de-

fendant company. The complaint, among other things, alleges in substance that on the 4th day of August, 1914, the plaintiff was employed by the defendant in its mine at Morenci, Arizona, and that on said day, while in said employment, and while engaged in work for the defendant, and acting within the scope of his duties, a large quantity of rock and earth fell upon and struck the plaintiff violently on his head, causing him to fall, and rendering him unconscious for a time, and producing in him a weak, giddy, nauseated and confused condition, and causing contusion, concussion and abscess of the brain, resulting in a paralysis of the nerves, loss of motor power, and permanently disorganizing his nervous system; that he is not now, nor will he ever be able to perform any kind of manual labor, and that his said injuries are permanent; that the said injuries were the result of an accident due to a condition of such occupation and employment, and were not caused by his own negligence. I have not stated the facts as proven on the trial, but merely what the plaintiff in his complaint claims were the facts.

The defendant in its answer admits that during all the times mentioned in the complaint it was a corporation, lawfully organized and doing business in Greenlee County, Arizona, and engaged in the business of mining, smelting and divers other business pursuits. The defendant also admits that on August 4th, 1914, plaintiff was employed by the defendant, and was in its employ, but the defendant denies that the plaintiff, while engaged in his work for the defendant, received the injuries mentioned and described in his complaint, and alleges that if he did receive any injury or injuries, they were the direct and proximate result of the plaintiff's own negligence.

This action is brought by virtue of the laws of the State of Arizona, by virtue of Chapter 6 of Title 14 of the Civil Code, Revised Statutes of Arizona, 1913, entitled "Liability of Employers for Injuries to Workmen in Dangerous Occupations," commonly called and generally known as the "Employer's Liability Act." Under the provisions of this Act an employer in certain hazardous occupations, among them mining, is liable for the personal injury of an employee by an accident arising out of and in the course of such labor, service and employment, and due to a condition or conditions of such occupation or employment, in all cases in which such injury of such employee shall not have been caused by the negligence of the employee injured. And in such case the employer is liable, even though he, himself be wholly free from any fault or negligence. I say, under such conditions as I have stated to you the employer is liable even though he himself be wholly free from any fault or negligence, provided, of course, that the injury of the employee shall not have been caused by his own negligence.

111 I charge you as a matter of law that the occupation of the plaintiff on August 4th, 1914, if he was so employed, in or about the defendant's mine, is a hazardous occupation within the meaning of the Arizona Employer's Liability Law.

Now, gentlemen, it is your duty in this case to consider the evi-



dence in the cause as a whole, and not to give undue importance to minor points or portions of the evidence taken piece-meal. Any case involving much testimony and many facts should not be decided upon the probability or improbability of any point singled out of the evidence, but a proper decision requires due consideration to be given to all of the evidence, direct and circumstantial, in the case.

I charge you that you are made by law the sole judges of the facts in this case, and of the credibility of each and all of the witnesses who have testified in the case, and of the weight that you will give to the testimony of the several witnesses who have appeared before you. In determining the credibility of any witness and the weight you will give to his testimony, you have the right to take into consideration his manner and appearance while giving his testimony, his means of knowledge, any interest or motive which he may have, if shown, and the probability or improbability of the truth of his statements when considered in connection with the other facts and circumstances in the case.

If you believe that any witness has wilfully sworn falsely as to any material fact in the case, then you may entirely disregard such witness's testimony except insofar as he may be corroborated by other credible evidence in the case, and by the facts and circumstances proven in the case. The legal presumption is that witnesses speak the truth, but this is but a *prima facie* presumption and may be repelled by the testimony and the demeanor of the witness.

It will be your duty in this case to be governed by the evidence which has been introduced before you and the law as herein given you, regardless of the condition of the parties hereto financially, and regardless of the effect of your verdict upon the parties, or either of them.

You are to look at the evidence in this case in a common-sense light, and to judge it by that experience and observation of human affairs of which you are possessed as individual members of society, and to endeavor to arrive at the truth as the evidence shows it to be.

I charge you that the burden of proof in this case is upon the plaintiff to establish by a preponderance of the evidence the material allegations of his complaint, and if he has failed to do so he cannot recover. Now by a preponderance of the evidence I mean the greater weight of the evidence. It does not necessarily mean that a greater number of witnesses shall be produced upon one side or the other. It means the more convincing force, or the greater probability of the truth of the evidence on one side when compared with, or weighed against the evidence of the opposition.

112 By burden of proof wherever used in these instructions is meant this: that the party upon whom the burden of proof devolves must prove or make out his contention by a preponderance of the evidence, as I have heretofore defined that term for you.

The first question to be presented to you for your consideration and determination is whether the plaintiff, Bray, at the time and



place mentioned in the complaint, and while in the service or employment of the defendant, and in the course of his labor, received the injuries, or any of the injuries mentioned and described in the complaint. If you answer this in the affirmative; that is, that the plaintiff in the course of his labor and while in the service and employment of the defendant, received the injuries complained of, or any of such injuries, then you will determine whether such injuries so received by the plaintiff were due to a condition or conditions of his occupation and employment, and if you believe from the evidence in this case that the plaintiff was so injured as alleged in his complaint, and that such injuries were suffered or caused by an accident arising out of such labor, service and employment, and that the same were due to a condition or conditions of such occupation or employment, then you must consider and determine whether or not such injuries were caused by the negligence of the plaintiff, Bray; because if such injuries were caused by the negligence of the plaintiff himself, then he cannot recover in this action, and your verdict must be for the defendant. I say, gentlemen, if you come to this conclusion; that is, that the injury or injuries alleged and mentioned in the complaint, and alleged to have been sustained by the plaintiff were caused by the plaintiff's own negligence, then he cannot recover in this action, and you need not go any further in the case. You stop right there and return a verdict for the defendant.

Now the word "negligence" has been used a number of times in argument and in these instructions. By negligence is meant the want of reasonable and ordinary care which, under the same conditions and circumstances would be exercised by persons of ordinary prudence and foresight. Negligence may consist of an act or of a failure to act. It is therefore such an act as a person of ordinary care under existing conditions and circumstances would not do, or such a failure to do something which under the existing conditions and circumstances a person of ordinary care would have done. Or, as the Supreme Court of the United States has said, "Negligence is the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation, or doing what such person under existing circumstances would not have done. The essence of the fault may lie in omission or commission—the doing or the failure to do. The duty is dictated and measured by the exigencies of the occasion." In no event can the plaintiff recover unless he has established by a preponderance of the evidence that the alleged injuries sustained by him were not caused by his own negligence.

Therefore, if you believe from the evidence that the plaintiff's injuries were caused by his own negligence, or if he has failed to establish by a preponderance of the evidence that the injuries complained of, if any, were not caused by his own negligence, then your verdict must be for the defendant.

113 You are further instructed that the law under which this action is brought bases the liability of the defendant company for damages solely upon the fact that the accident and the resulting

injuries were due to a condition or conditions of a hazardous occupation of an employee in the service of such employer in said hazardous occupation. Now, so far as I am advised, that term has never been defined, and I have not found anyone who seems to know what that means. I do not know that I clearly understand exactly what it does mean, but I will give you what I believe is the meaning of the term, "condition or conditions of employment." The terms "condition or conditions of employment", as used in the Arizona Employers' Liability Act, mean a situation of succession of situations, raising in the progress of the work being done by the employee which may endanger the life or safety of the employee, whether arising from the negligence of the employer or otherwise. It includes all such situations as should or might be foreseen, or such as might in the ordinary course of events come about, but does not include those extraordinary occurrences or situations which would not naturally be brought about even by the negligence of the employer, and which could not, by the exercise of the highest degree of prudence and foresight, have been foreseen.

Now, gentlemen, if you find from the testimony that the plaintiff at the time and place mentioned in the complaint sustained any of the injuries set out in the complaint, and that such injury or injuries were not caused by, or were not the result of his own negligence, you will next consider and determine the nature and extent of said injuries so sustained. I have already stated to you that the defendant in its answer denies that the injuries so sustained by the plaintiff were either of the nature or the extent as set out in the complaint. This is a point for you, the jury, to determine—the nature and extent of the injuries, and in this connection, the burden of proof is upon the plaintiff to show by a preponderance of the evidence that the injuries, defects and afflictions of which he complains, or some of them, are the proximate result of said accident. All of the injuries for which you award damages to the plaintiff, if you award any damages, must by a preponderance of the evidence, be shown to have been sustained as a natural and proximate result of said accident, and, of course, plaintiff cannot recover for any injury or injuries other than those shown to have been sustained at the time and place mentioned in the complaint.

Before I proceed further, gentlemen, I perhaps should state that if the plaintiff has sustained the injury or injuries mentioned and described in the complaint, and under the conditions which I have heretofore stated, and while in the service of the employer, and that it was due to a condition or conditions of such service and employment, the question as to whether or not the employer, the company, was negligent is not a material question in this case, because if the injury or injuries were so received under such circumstances, and if the plaintiff himself was not guilty of negligence, then, as heretofore stated to you, the defendant is liable, notwithstanding the fact that the defendant, the company, was guilty of no fault or negligence whatever.

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As above stated, you are made the sole judges as to the extent or degree of the injuries, if any, so sustained; that is, as

to whether or not they are—permanent in character, and as to what extent, if any, by reason of such injuries, plaintiff has suffered mental or physical pain and anguish, or both; also, as to what extent, if any, he has been by reason of such injuries crippled or disfigured, and as to what extent, if at all, by reason of such injuries so sustained he has been disabled and incapacitated from following his usual vocation as described in the complaint—the vocation of a miner—and as to whether or not the incapacitation, if any, is permanent or merely temporary.

All of these points, gentlemen, go to make up the nature and extent of the claim—or alleged injuries, and should you award plaintiff damages in any amount, it is your duty to consider each and every one of these points as a factor in computing the award. If you award damages to the plaintiff in this case, in addition to the factors I have just mentioned, you will also make due and adequate allowance for the reasonable value of time lost by the plaintiff, if he has lost any time as a result of said injury or injuries, from August 4th, 1914, to this date.

In the ascertainment of damages, the law does not lay down any definite, mathematical rule. It says that you, the jury, must be governed by sound sense and good judgment, and make such award of damages, if any, as would be just compensation. The testimony in this case shows that the plaintiff is forty-nine years of age, and testimony has been received for the purpose of showing that the probably duration of the life of a person of forty-nine years of age is twenty-one and six-tenths years. This testimony was based upon the American Mortality Tables, which are framed upon the basis of the average duration of the lives of a great number of persons, but it has been held that the rules to be derived from such tables may not be the absolute or sole guides of the judgment and conscience of the jury in cases of this character. It may, however, be considered by you in connection with all the other evidence in the case.

You are instructed that the law does not place a liability upon the defendant for every infirmity, illness, impairment or disability that may have arisen in Richard Bray, the plaintiff, during his employment by the defendant. To recover for any infirmity, illness, impairment or disability, if any that you may find to have arisen or developed in the plaintiff during his employment by the defendant, the plaintiff must prove by a preponderance of the evidence that such condition resulted directly and proximately from an injury or injuries or accident sustained by the plaintiff while in the defendant's employ, and due to a condition or conditions of plaintiff's occupation with defendant, and that arose out of and in the course of the plaintiff's employment.

As above stated, if you find for the plaintiff, you should award a fair and reasonable compensation—no more—taking into consideration what the plaintiff's income would probably have been, how long it would have lasted, whether he would probably have had permanent employment during the balance of his expectancy of twenty-one and six-tenths years; whether or not he would have remained in health and capable of doing work during

all those years, the condition of his health and all the contingencies to which it was liable, such as illness, failure to obtain employment, and all those things. Such award or compensation, if any you give him, must not in any event exceed the amount claimed in plaintiff's complaint. If you find that the plaintiff is entitled to recover in this action, the amount of recovery, if any, is for you to determine from all the facts in the case. Of course, you cannot measure in dollars and cents the exact amount to which he is entitled, if any, but it is for you to say in the exercise of a sound discretion from all the facts in the case, after considering and weighing all the evidence produced before you, without fear and without favor and without passion and prejudice, what amount of money will reasonably compensate him for the damages, if any, he has sustained.

You decide this case as you would were it a case between two individuals. If you find for the plaintiff in this case under the instructions given you by the court, and find that the plaintiff has sustained damages as set forth in his petition or complaint, then to enable you to estimate the amount of such damages, it is not necessary that any witness should have expressed an opinion as to the amount of such damages, but you may yourselves make such estimate from the facts and circumstances in proof, and by considering them in connection with your knowledge, observations and experience in the ordinary every-day affairs of life.

If, under the facts in this case and the law as I have stated it to you, you come to the conclusion that the plaintiff is entitled to recover some amount as compensation for the injuries he has sustained, if he has sustained any, you must not render what is known as a quotient verdict, that is, you must not add together the amount of the sums which each of you believe the plaintiff is entitled to and divide by twelve or any other number. Such or any similar method of arriving at plaintiff's compensation would be unlawful, and the court would be compelled to set aside the verdict.

Now, gentlemen, you have heard all the facts in this case and the argument of counsel, and it is for you to pass upon the facts under the instructions which I have given you. If you find for the plaintiff the form of your verdict will be "We, the jury, duly empanelled and sworn in the above entitled cause, upon our oaths, do find for the plaintiff and assess his damages at —Dollars," inserting the amount which you determine he is entitled to. If you find for the defendant the form of your verdict will simply be, "We, the jury, duly empanelled and sworn upon our oaths, do find for the defendant." You will cause your foreman to sign the verdict which represents your conclusions and return it into court.

Are there any exceptions on either side?

Mr. McFarland: If the Court please, we except to that part of your Honor's charge in the court's definition of "condition or conditions" caused by the negligence of the defendant or otherwise, 116 wise, on the ground that negligence is not a factor in the case, nor is the liability based upon negligence so that a charge that it was caused by the defendant's negligence or otherwise,

we think is error, and ask the court to give us an exception to that instruction.

The Court: Very well. Let the exception be noted. Swear a bailiff.

Bailiff sworn.

The Court: Gentlemen of the jury, you will not separate during the time that you are deliberating unless by order of the Court. You may retire.

### *Certificate.*

I, H. C. Nixon, do hereby certify that I was present in the above-entitled court on Thursday, December 2nd, Friday, December 3rd, and Saturday, December 4th, 1915; that I took down in shorthand all the questions propounded to the several witnesses and their answers thereto, as well also as all offers of proof, documentary evidence, objections, remarks and exceptions of counsel, and all rulings, opinions and instructions given or rendered during the trial thereof by the judge presiding at the trial, and that I have transcribed the said shorthand notes so taken by me, and that the foregoing eighty-seven pages of typewritten matter contain a full, true and correct transcript of the said shorthand notes so taken by me, and that they contain all the oral evidence given in the trial of the said cause.

Dated at Tucson, Arizona, January 6th, 1916.

H. C. NIXON.

117 And the foregoing was all the evidence given, introduced, heard and exhibited at the trial of said cause.

Be it further remembered, that during the trial of this cause the following proceedings among others were had.

### I.

Dr. Meade Cline being on the witness stand and having been duly sworn as a witness for the plaintiff, was asked by plaintiff's counsel, the following question (p. 31):

"Assuming, Doctor, that a man working in a tunnel, in a mine, is struck on the head by a falling stone with sufficient force, and of sufficient size to *known* him down and stun him for some five, ten or fifteen minutes, but from which he recovers and experiences no further inconvenience other than the natural soreness resulting from such a blow, for four or five days, or possibly a week, thereafter; and assuming that in about four or five days, or possibly a week thereafter he begins to experience dizziness when walking, and staggering unsteadily, which condition continues to grow gradually worse for approximately two weeks, when he is unable to longer continue work on account of such condition; and assuming that in about five or six weeks thereafter he is operated upon for an abscess of the brain, and the abscess located and opened within a short distance, say three or four inches of the place of injury; that he had there-

tofore been in good health and had not within several years prior to such injury experienced any other injury or illness of any character, to his knowledge; what in your opinion would have been the cause of such abscess?"

To which said witness was permitted over defendant's objection to answer (p. 32):

"The cause would most probably have been the injury that he received."

118 Defendant objected to said question before said witness answered, upon the ground that said question is a hypothetical question so framed as not to be based upon evidence then before the court and jury, and as stating and assuming facts that were not in evidence and that were contrary to the evidence given by the plaintiff. That the court thereupon overruled defendant's objection to said question, to which ruling of the court, defendant then and there excepted and still excepts, which said exception was allowed.

## II.

Dr. Meade Cline being on the witness stand and having been duly sworn as a witness for the plaintiff, was asked by plaintiff's counsel, the following question (p. 33):

"Assuming, Doctor, that a man working in a tunnel in a mine is struck on the head by a falling stone with sufficient force to knock him down and rendered him unconscious for some five, ten or fifteen minutes, but from which he recovers and experiences no further inconvenience other than the natural soreness resulting from such a blow, for four or five days, or probably a week; and assuming that in about four or five days, or probably a week thereafter he begins to experience dizziness when walking, and staggering unsteadily, which condition continues to grow gradually worse for approximately two weeks, when he is unable to longer continue work on account of such condition; and assuming that in about five or six weeks thereafter he is operated upon for an abscess of the brain and an abscess is located and opened within a short distance, say, there or four inches of the place of injury; in your opinion would it have been necessary that the stroke upon the head that I have just mentioned should have left a permanent scar upon the scalp in order to have been of such character or such force as to have resulted in or produced the abscess that I have just mentioned?"

To which said question said witness was permitted over defendant's objection to answer, p. 34:

"I think that could happen without necessarily leaving a scar."

119 That defendant objected to said question before the witness answered and upon the ground that said question is a hypothetical question so framed as not to be based upon evidence then before the court and jury, and as stating and assuming facts that were not in evidence and that were contrary to the evidence given by the plaintiff. The court thereupon overruled defendant's objection to said question, whereupon defendant then and there excepted and still excepts, which exception was allowed.



## III.

Dr. Meade Clyne being on the witness stand and having been duly sworn as witness for the plaintiff, was asked by plaintiff's counsel, the following question (p. 35):

"What, in your opinion, Doctor, is the effect upon the brain of an abscess on the brain which has been opened and drained?"

To which said witness was permitted over defendant's objection to answer (p. 35):

"The effect would be a destruction of some of the nerve cells and the adhesions that would result in the drainage of such an abscess—adhesions between the fura."

That defendant objected to said question before the witness answered and upon the ground that the same was incompetent, irrelevant and immaterial, for the reason that said question seeks to ascertain the effect upon the brain of an abscess of the brain which has been opened and drained, without limiting the question to the particular part of the brain, in which this plaintiff was alleged to have sustained an abscess and the effect upon plaintiff's brain of an abscess opened and drained in that particular region. The court overruled defendant's said objection to which ruling of the court the defendant then and there excepted and still excepts, which exception was allowed.

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## IV.

Richard Bray being on the witness stand and having been duly sworn as a witness and having been called by defendant for purpose of cross-examination under the Statute of the State of Arizona in such case provided, was asked by defendant's counsel, the following question (p. 47):

"Whose doctors did you consider Drs. Goodrich and Stanton when you consulted them?"

To which question plaintiff objected, which objection was sustained by the court, to which ruling of the court defendant then and there excepted and still excepts, which said exception was allowed.

That this defendant sought by said question to have this plaintiff testify whose doctors he considered Drs. Goodrich and Stanton, who examined him at the Town of Morenci, County of Greenlee, State of Arizona, shortly after the alleged injury of plaintiff, for which recovery was sought herein.

## V.

Richard Bray being on the witness stand and having been duly sworn as a witness and having been called by defendant for purposes of cross-examination under the Statute of the State of Arizona in such case provided, was asked by defendant's counsel, the following question (p. 47):

"Now, Mr. Bray, I will ask you this question: When you first went to see Doctor Goodrich, is it not a fact that upon repeated

questionings by him as to whether you had received a head injury, you did not deny receiving those injuries?"

To which question plaintiff then and there objected, which objection the court sustained. That defendant then and there excepted to the ruling of the court and still excepts, which said exception was allowed.

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## VI.

Richard Bray being on the witness stand and having been duly sworn as a witness and having been called by defendant for purposes of cross-examination under the Statute of the State of Arizona in such case provided, was asked by defendant's counsel, the following question: (p. 49.)

"I will ask you, Mr. Bray, if on the taking of your deposition in Salt Lake City in October of this year you weren't asked if, when you went to see the doctors in Morenci, upon repeated questioning, if you had received such an injury, you didn't deny having received that injury; and did not you reply that you might or might not?"

To which question plaintiff then and there objected, which said objection was by the court sustained. That defendant then and there excepted to the ruling of the court and still excepts, which said exception was allowed.

## VII.

That at the conclusion of all the evidence in the case and before the court had instructed the jury and before the jury had retired to consider of their verdict, defendant moved the court that a verdict be directed in behalf of this defendant on the following grounds: (p. 80.)

First. Because the evidence in the cause fails to show that the blow caused the abscess in plaintiff's brain.

Second. Because from all the evidence in the cause a verdict and judgment should be for the defendant.

Third. Admitting that plaintiff has established his case as alleged in his complaint, he is not entitled to a verdict for the reason that plaintiff's case is predicated upon the Employers' Liability Act of the State of Arizona, which is unconstitutional in this: That said act is

122 in conflict with the Fourteenth Amendment of the Constitution of the United States, which declares that no one shall be deprived of his life, liberty or property, without due process of law; that the taking of property without fault is expressly prohibited under the Fourteenth Amendment.

That the court overruled and denied defendant's said motion, to which ruling of the court defendant then and there excepted and still excepts, which said exception was allowed.

## VIII.

That at the conclusion of the evidence in the case, the court instructed the jury among other things, as follows: (p. 85.)



"You are further instructed that the law under which this action is brought bases the liability of the defendant company for damages solely upon the fact that the accident and the resulting injuries were due to a condition or conditions of a hazardous occupation of an employee in the service of such employer in said hazardous occupation. Now, so far as I am advised, that term has never been defined and I have not found anyone who seems to know what that means. I do not know that I clearly understand exactly what it does mean, but I will give you what I believe is the meaning of the term, "condition or conditions of employment". The terms "condition or conditions of employment", as used in the Arizona Employers' Liability Act, mean a situation, or succession of situations, arising in the progress of the work being done by the employee which may endanger the life or safety of the employee, whether arising from the negligence of the employer or otherwise. It includes all such situations as should or might be foreseen or such as might in the ordinary course of events come about, but does not include those extraordinary occurrences or situations which would not naturally be brought about even by the negligence of the employer, and which could not, by the exercise of the highest degree of prudence and foresight, have been foreseen".

That defendant then and there in the presence of the court and in the presence of the jury, and before the jury had retired to consider of their verdict, excepted to said instruction of the court, for the reason that said instruction erroneously defined to the  
 123 jury what in law is a condition or conditions of the occupation of the plaintiff, out of which it was alleged plaintiff's injury arose. That said definition and instruction were erroneous in this, that the jury were instructed that a condition or conditions of employment means a situation or succession of situation- arising in the progress of the work being done by the employee which may endanger the life or safety of the employee whether arising from the negligence of the employee or otherwise; that the negligence of the employer and of the plaintiff herein was not and is not a factor or a part of the condition or conditions of the employment of plaintiff, and that the negligence of this defendant was not a factor or an element to be considered at all in plaintiff's case predicated solely upon the Employers' Liability Act.

And the defendant prays that this its bill of exceptions may be allowed, settled and signed.

W. C. McFARLAND,  
 H. A. ELLIOTT,  
*Counsel for Defendant.*

Settled and allowed this 4th day of March, A. D., 1916, in term.  
 WM. H. SAWTELLE, Judge.

Endorsements: In the United States District Court in and for the District of Arizona. Richard Bray, Plaintiff, vs. The Arizona Copper Company, Limited, a corporation, Defendant. No. 44 Tucson. Defendant's Proposed Bill of Exceptions. Filed this 4th day of March,

A. D., 1916. Mose Drachman, Clerk, By Effie D. Botts, Deputy Clerk. Received copy within defendant's proposed bill of exceptions this 1st day of March, A. D., 1916. Frank E. Curley, Counsel for plaintiff. W. C. McFarland, H. A. Elliott, Counsel for Defendant, Clifton, Arizona.

124 In the District Court of the United States in and for the District of Arizona.

THE ARIZONA COPPER COMPANY, LIMITED, a Corporation, Plaintiff  
in Error,

vs.

RICHARD BRAY, Defendant in Error.

*Petition for Writ of Error.*

The above-named Plaintiff in Error, The Arizona Copper Company, Limited, a Corporation, respectfully shows that the above-entitled cause is now pending in the United States District Court, in and for the District of Arizona, and that judgment has therein been rendered, on the 4th day of December, 1915, upon a verdict of the jury, duly empaneled in the cause, and in favor of the Defendant in Error, Richard Bray, and against The Arizona Copper Company, Limited, for the sum of Nine Thousand (\$9,000) Dollars and costs; that on the 14th day of January, 1916, Plaintiff in Error, The Arizona Copper Company, Limited, filed its petition for a new trial in the above-entitled cause, which said petition for a new trial was by this court denied on the 29th day of February, 1916; and that this cause is a proper cause to be reviewed by the Supreme Court of the United States on writ of error.

Wherefore, The Arizona Copper Company, Limited, prays that a writ of error may issue in this behalf to said United States District Court, in and for the District of Arizona, and that the Clerk of said United States District Court, in and for the District of Arizona, be authorized and directed to sign, seal and issue said writ of error, and

125 that said Clerk be further directed to send the records and proceedings of this cause, with all things concerning the same, to the Supreme Court of the United States, in order that the errors complained of in the assignment of errors herewith filed by said Plaintiff in Error may be reviewed, and if error be found, corrected according to the laws and customs of the United States.

And your Petitioner will ever pray.

W. C. MCFARLAND,

H. A. ELLIOTT,

*Attorneys for Plaintiff in Error.*

Approved March 4th, 1916.

Petition granted and writ of error allowed on giving bond in the sum of Twelve Thousand (\$12,000) Dollars, conditioned as the law directs, this 4th day of March, 1916.

WM. H. SAWTELLE,

*Judge of the United States District Court  
in and for the District of Arizona.*

Endorsements: No. 44 Tucson. In the District Court of the United States for the District of Arizona. The Arizona Copper Company, Limited, a corporation, Plaintiff in Error, vs. Richard Bray, Defendant in Error. Petition for Writ of Error. W. C. McFarland and H. A. Elliott, Attorneys for Plaintiff in Error. Filed March 4, A. D., 1916. Mose Drachman, Clerk. By Effie D. Botts, Deputy Clerk.

126 In the District Court of the United States in and for the District of Arizona.

THE ARIZONA COPPER COMPANY, LIMITED, a Corporation, Plaintiff  
in Error,

vs.

RICHARD BRAY, Defendant in Error.

*Assignment of Errors.*

Comes now The Arizona Copper Company, Limited, a corporation, by its attorneys, W. C. McFarland and H. A. Elliott and in connection with its petition for a writ of error herein, makes the following assignment of errors, which it will urge upon the prosecution of the said writ of error in the above-entitled cause, to-wit:

I.

Because the court erred in overruling plaintiff in error's general demurrer, demurring to defendant in error's complaint on the ground that said complaint does not state facts sufficient to constitute a cause of action against this plaintiff in error.

II.

Because the court erred in overruling plaintiff in error's special demurrer No. 1, demurring to defendant in error's complaint on the ground that it appears upon the face of said complaint, in fact it is admitted by the defendant in error, as shown by the record, that defendant in error seeks to recover judgment against plaintiff in error under and by virtue of the provisions of Chapter VI of Title XIV, Revised Statutes of Arizona, 1913, known as the Employers' Liability Law, enacted pursuant to the provisions of Section VII of Article XVIII, of the Constitution of the State of Arizona, without any charge or showing of negligence, wrong or default on the part  
127 of this plaintiff in error, causing or contributing to defendant in error's alleged injury; and that said Employers' Liability Law and said Section VII of Article XVIII, of the Constitution of Arizona, are in contravention and violation of the Constitution of the United States, particularly of the Fourteenth Amendment thereto, in that they seek to deprive this plaintiff in error of its property without due process of law, and to deny it the equal protection of the laws of the State of Arizona, by subjecting it to unlimited liability for

damages for personal injuries suffered by its employee without any fault, wrong or negligence on the part of this plaintiff in error, causing such injuries or contributing thereto, and that for the reasons in this paragraph above set forth, said complaint does not state facts sufficient to constitute a cause of action against this plaintiff in error.

### III.

Because the court erred in overruling plaintiff in error's special demurrer No. 2, demurring to defendant in error's complaint on the ground that it appears on the face of said complaint that defendant in error seeks to recover judgment against plaintiff in error under and by virtue of the provisions of Chapter VI, of Title XIV, of the Civil Code, Revised Statutes of Arizona, 1913, known as the Employers' Liability Law, and that said Employers' Liability Law is in violation and contravention of the Constitution of the State of Arizona, and particularly of Sections 5 and 7, of Article XVIII thereof, in that said Employers' Liability Law attempts to give defendant in error the right to recover damages of plaintiff in error in this action notwithstanding the injuries for which such damages are claimed were contributed to and in part caused by defendant in error's  
128 own negligence and attempts to deprive plaintiff in error of the right to wholly defeat this action by showing that said injuries were contributed to and in part caused by defendant in error's own negligence, and that for the reasons in this demurrer set forth, said complaint does not state facts sufficient to constitute a cause of action against the plaintiff in error.

### IV.

Because the court erred in overruling plaintiff in error's special demurrer No. 7, demurring to defendant in error's amended complaint on the ground that it appears in said complaint that the alleged injury or injuries to this defendant in error, if any there were, were occasioned wholly by, and resulted from the usual and ordinary risks of the employment in which defendant in error was engaged at the time and place of the said alleged injury or injuries as in said complaint described, and were wholly assumed by this defendant in error in entering upon and continuing in said employment, and that said risks were wholly known to and appreciated by said defendant in error in entering on and continuing in said employment, or by the exercise of reasonable diligence on the part of this defendant in error, could have been fully known to and appreciated by him, in that it is not alleged in said complaint that the dangers of said employment at the time and place and in the manner mentioned and described in said complaint, were latent or hidden from or undiscovered to this plaintiff, and that by the exercise of due or any diligence or care for his personal safety, that he could not have discovered said conditions and have thereby avoided his said injury or injuries.

## V.

Because the court erred in overruling plaintiff in error's special demurrer No. 8, demurring to defendant in error's amended complaint on the ground that it is not alleged in said complaint that the acts and things done or said by the officers, servants, employees or other agents of this plaintiff in error, at the time and place of defendant in error's alleged injury or injuries by this defendant in error in his complaint alleged to have caused the said injury or injuries, were done and said by such officers, servants, employees or other agents of this plaintiff in error, while acting within the course of the employment and within the scope thereof of said officers, servants, employees or other agents, while then and there in the employ of this plaintiff in error.

## VI.

Because the court erred in granting defendant in error's motion to strike that part of plaintiff in error's amended answer, being that part of said answer on page 6 thereof as follows:

"Further answering said complaint as a separate defense to this action, defendant alleges that the alleged injury or injuries, if any, were suffered by plaintiff, either as alleged in said complaint or otherwise, by plaintiff's own want of care, and but for such want of care such accident or injury would not have occurred."

## VII.

Because the court erred in sustaining defendant in error's demurrer to paragraph 4 on page 6 of said amended answer, said paragraph being as follows:

"For further defense to said complaint. defendant alleges that the alleged injury or injuries, if any, were suffered by plaintiff, either as alleged in said complaint, or otherwise, were wholly occasioned by and wholly resulted from the open, usual and ordinary risks from the employment in which plaintiff was engaged at the time and place of his alleged injury or injuries, as in said complaint described, which said risks of said employment were wholly assumed by plaintiff by entering upon and continuing in said employment. That said risks were fully known to and appreciated by said plaintiff in entering upon and continuing in said employment, or by the exercise of reasonable diligence on his part, should have been fully known and appreciated by him."

## VIII.

Because the court erred in sustaining the defendant in error's objection to the following question asked Richard Bray, the defendant in error, in behalf of the plaintiff in error upon  
130 plaintiff in error's cross examination of the said Bray under the statutes:

"Q. Now, Mr. Bray, I will ask you this question: When you first went to see Doctor Goodrich, is it not a fact that upon repeated questionings by him as to whether you had received a head injury, you did not deny receiving those injuries?"

### IX.

Because the court erred in sustaining the defendant in error's objection to the following question asked Richard Bray, the defendant in error, in behalf of the plaintiff in error, upon plaintiff in error's cross examination of the said Bray under the statute:

"Q. I will ask you, Mr. Bray, if on the taking of your deposition in Salt Lake City in October of this year you weren't asked if, when you went to see the doctors in Morenci, upon repeated questioning, if you had received such an injury, you didn't deny having received that injury; and did you not reply that you might or might not?"

### X.

Because the court erred in sustaining defendant in error's objection to the following question propounded by the plaintiff in error to Richard Williams called on behalf of the plaintiff in error:

"Q. I will ask you what would be the thing done, as a common practice, in the mine at Morenci in the event that a miner or timberman was working with his helper, and in the presence of his helper the timberman should sustain such an injury as by being hit on the head with a rock and knocked unconscious for a period of, we will say, from five to ten minutes?"

### XI.

Because the court erred in denying plaintiff in error's motion for a directed verdict in behalf of the plaintiff in error.

### XII.

Because the court erred in giving to the jury the following instruction:

131 "You are further instructed that the law under which this action is brought bases the liability of the defendant company for damages solely upon the fact that the accident and the resulting injuries were due to a condition or conditions of hazardous occupation of an employee in the service of such employer in said hazardous occupation. Now, so far as I am advised, that term has never been defined, and I have not found anyone who seems to know what that means. I do not know that I clearly understand exactly what it does mean, but I will give you what I believe is the meaning of the term, "condition or conditions of employment." The term "condition or conditions of employment," as used in the Arizona Employers' Liability Act, means a situation or succession of situations arising in the progress of the work being done by the employee, which may endanger the life or safety of the employee,

whether arising from the negligence of the employer or otherwise. It includes all such situations as could or might be foreseen, or such as might in the ordinary course of events come about, but does not include those extraordinary occurrences or situations which would not naturally be brought about even by the negligence of the employer, and which could not, by the exercise of the highest degree of prudence and foresight have been foreseen."

XIII.

Because the evidence at the trial was insufficient to justify the verdict of the jury in this; viz:

For the reason that there was no evidence introduced at the trial on the part of the defendant in error or on the part of the plaintiff in error, proving or tending to prove directly or by inference that the injury or injuries of this defendant in error upon which defendant in error predicated his action, were not caused by his own negligence.

XIV.

Because the damages assessed by the jury are excessive.

XV.

Because the verdict of the jury is against the law.

XVI.

Because under the law and the evidence in the cause, the verdict and judgment should be for the plaintiff in error.

Wherefore plaintiff in error prays that the judgment of said Court be reversed.

W. C. McFARLAND,  
H. A. ELLIOTT,

*Attorneys for the Arizona Copper Company,  
Limited, Plaintiff in Error.*

Endorsement: No. 44 Tucson. In the District Court of the United States for the District of Arizona. The Arizona Copper Company, Limited, a corporation, Plaintiff in Error, vs. Richard Bray, Defendant in Error. Assignment of Errors. W. C. McFarland, and H. A. Elliott, Attorneys for Plaintiff in Error. Filed March 4, A. D., 1916. Mose Drachman, Clerk, by Effie D. Botts, Deputy Clerk. Received copy of within Petition for Writ of Error and Assignments of Error this 4th day of March, 1916. Frank E. Curley, Attorney for Defendant in Error.



133 In the District Court of the United States in and for the District of Arizona.

THE ARIZONA COPPER COMPANY, LIMITED, a Corporation, Plaintiff  
in Error,

vs.

RICHARD BRAY, Defendant in Error.

*Order Allowing Writ of Error from the Supreme Court of the United States and Fixing Amount of Supersedeas Bond.*

On this 4th day of March, 1916, came Plaintiff in Error, by W. C. McFarland and H. A. Elliott, its attorneys, and filed herein and presented to the Court its petition, praying for the allowance of a writ of error intended to be urged by it; praying also that a transcript of the record and proceedings and papers in said cause, duly authenticated, may be sent to the Supreme Court of the United States, and that such other and further proceedings may be had as may be proper in the premises.

In consideration whereof said writ of error is allowed upon said Plaintiff in Error giving a bond according to law in the sum of Twelve Thousand (\$12,000) Dollars, which shall operate as a supersedeas bond.

And it is further ordered that said petition is hereby allowed and granted, and that the writ of error be allowed in said cause, returnable before the Supreme Court of the United States on the 1st day of May, 1916; and that the Clerk of this Court is authorized and directed to sign and seal the writ, and that a transcript of all proceedings and papers in said cause shall be made and transmitted to the United States Supreme Court.

134 It is further ordered that all proceedings herein be stayed until determination of said writ of error by said Supreme Court of the United States.

WM. H. SAWTELLE,  
*Judge of the District Court of the United States  
in and for the District of Arizona.*

Service of the within order for a writ of error by receipt of true copy admitted this, the 4 day of March, 1916.

FRANK E. CURLEY,  
*Attorney for Defendant in Error.*

Endorsement: No. 44 Tucson. In the District Court of the United States for the District of Arizona. The Arizona Copper Company, Limited, a corporation, Plaintiff in Error, vs. Richard Bray, Defendant in Error. Order allowing writ of Error from the Supreme Court of the United States, and Fixing amount of Supersedeas Bond. W. C. McFarland and H. A. Elliott, Attorneys for Plaintiff in Error. Filed March 4, A. D., 1916. Mose Drachman, Clerk, by Effie D. Botts, Deputy Clerk.

135 In the District Court of the United States in and for the District of Arizona.

THE ARIZONA COPPER COMPANY, LIMITED, a Corporation, Plaintiff  
in Error,

vs.

RICHARD BRAY, Defendant in Error.

*Bond on Writ of Error from Supreme Court of the United States.*

Know all men by these presents: That The Arizona Copper Company, Limited, a corporation, plaintiff in error above-named, as principal, and American Surety Company of New York, a corporation, organized and existing under and by virtue of the laws of the State of New York, and authorized to do business as a surety company in the State of Arizona, as surety, are held and firmly bound unto Richard Bray, Defendant in error, above named, in the full and just sum of Twelve Thousand (\$12,000) Dollars, to be paid to the said defendant in error, to which payment well and truly to be made, the said principal binds itself, its successors and assigns jointly and severally, firmly by these presents.

Witness the names and seals of the said principal and surety, this 3rd day of March, 1916.

The condition of the above obligation is such that, whereas, at a session of the United States District Court, in and for the District of Arizona, in a suit pending in said court between The Arizona Copper Company, Limited, a corporation, plaintiff in error, and Richard Bray, defendant in error, said United States District Court, in and for the District of Arizona, rendered a final judgment  
136 upon a verdict of the jury duly empanelled in said cause; said judgment by said District Court being in favor of Richard Bray and against said The Arizona Copper Company, Limited, and being for the sum of Nine Thousand (\$9,000) Dollars with costs; and

Whereas, the said plaintiff in error obtained a writ of error to reverse the judgment of said United States District Court, in and for the District of Arizona, and filed a copy thereof in the Clerk's Office in said Court, and a citation directed to said Richard Bray, defendant in error, citing and admonishing the said defendant in error to be and appear before the Supreme Court of the United States;

Now, if the said, The Arizona Copper Company, Limited, shall prosecute its writ of error to effect, and shall answer all damages and costs that may be awarded against it, if it fails to make its plea

good, then the above obligation is to be void; otherwise to remain in full force and effect.

THE ARIZONA COPPER COMPANY,  
LIMITED,

By W. C. McFARLAND,

*Its General Attorney, Principal.*

AMERICAN SURETY COMPANY OF  
NEW YORK,

*A Corporation Organized and Existing under and  
by Virtue of the Laws of the State of New York  
and Authorized to do Business as a Surety Com-  
pany in the State of Arizona,*

By H. E. HEIGHTON, *Attorney in Fact.*

Countersigned by

RALPH W. LANGWORTHY.

Approved this 4th day of March, A. D. 1916.

WM. H. SAWTELLE,

*Judge of the United States District Court  
in and for the District of Arizona.*

Endorsements: No. 44 Tucson. In the District Court of the United States, in and for the District of Arizona. The Arizona Copper Company, Limited, a corporation, Plaintiff in Error, vs. Richard Bray, Defendant in Error. Bond of Writ of Error 137 from Supreme Court of the United States. Copy received March 4, 1916. Frank E. Curley, Attorney for Def't in error. W. C. McFarland and H. A. Elliott, Attorneys for Plaintiff in error. Filed March 4, A. D. 1916. Mose Drachman, Clerk, by Effie D. Botts, Deputy Clerk.

138 In the United States District Court in and for the District of Arizona.

THE ARIZONA COPPER COMPANY, LIMITED, a Corporation, Plaintiff  
in Error,

vs.

RICHARD BRAY, Defendant in Error.

*Præcipe.*

To the Clerk of said Court:

SIR: Please issue a single certified transcript of the record on return to Writ of Error taken by plaintiff in error from the Supreme Court of the United States in the above entitled cause, consisting of the following:

1. Complaint.
2. Summons and Return.

3. Amended Answer.
4. Transcript of Minute Entries.
5. Verdict of Jury.
6. Judgment.
7. Bill of Exceptions.
8. Petition for Writ of Error.
9. Assignment of Error.
10. Bond and approval thereof given on Writ of Error.
11. Order allowing Writ of Error.
12. Writ of Error.
13. Citation in Error.

W. C. McFARLAND,  
H. A. ELLIOTT,  
*Attorneys for Plaintiff in Error.*

Endorsement: In the United States District Court in and for the District of Arizona. No. 44 Tucson. The Arizona Copper Company, Limited, a corporation, Plaintiff in Error, vs. Richard Bray, Defendant in Error, *Præcipe*. Filed this 4th day of March, 1916. Mose Drachman, Clerk, by Effie D. Botts, Deputy Clerk. Service of within *Præcipe* by true copy admitted this 4th day of March, 1916. Frank E. Curley, Attorney for Defendant in Error. W. C. McFarland and H. A. Elliott, Attorneys for Plaintiff in Error, Clifton, Arizona.

139 *Certificate of Clerk United States District Court to Transcript of Record.*

In the United States District Court for the District of Arizona

No. 44. Tucson.

THE ARIZONA COPPER COMPANY, LIMITED, a Corporation, Plaintiff  
in Error,

vs.

RICHARD BRAY, Defendant in Error.

UNITED STATES OF AMERICA,  
*District of Arizona, ss:*

I, Mose Drachman, Clerk of the United States District Court for the District of Arizona, do hereby certify that the foregoing pages, number 1 to 138, inclusive, constitute and are a true, complete and correct copy of the record, pleadings, and proceedings had in the case of Richard Bray, Plaintiff, vs. The Arizona Copper Company, Limited, a corporation, Defendant, No. 44 Tucson, in this Court, as the same remain on file and of record in said District Court, and I also annex and transmit the original Writ of Error and Citation in Error, in said action.

I further certify that the cost of preparing and certifying to said

record amounts to the sum of \$163.30 and that the same has been paid in full by the plaintiff in Error, The Arizona Copper Company, Limited, a corporation.

In testimony whereof, I have hereunto set my hand and affixed the seal of the United States District Court for the District of Arizona, at Tucson, in said District, this twenty-fourth day of April, 140 in the year of our Lord one thousand nine hundred and sixteen, and of the Independence of the United States of America, the one hundred and fortieth.

[Seal United States District Court, District of Arizona.]

MOSE DRACHMAN,  
Clerk United States District Court,  
District of Arizona,  
By EFFIE D. BOTTS,  
Deputy Clerk.

141 In the District Court of the United States in and for the District of Arizona.

THE ARIZONA COPPER COMPANY, LIMITED, a Corporation, Plaintiff  
in Error,

vs.

RICHARD BRAY, Defendant in Error.

*Writ of Error.*

THE UNITED STATES OF AMERICA, ss:

The President of the United States of America to the United States District Court in and for the District of Arizona and the Honorable Judge thereof, Greeting:

Because in the records and proceedings, as also in the rendition of the judgment, of a plea which is in said United States District Court, in and for the District of Arizona, between The Arizona Copper Company, Limited, a corporation Plaintiff in Error, and Richard Bray, Defendant in Error, and manifest error hath appeared to the great damage of said Plaintiff in Error, as by its complaint appears; and it being fit, and we being willing that the error, if any there hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf:

You are hereby commanded, if judgment be therein given that then under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same to this, the Supreme Court of the United States, together with this writ, so you have the same in the said Supreme Court at 142 Washington, D. C., within sixty days from the date hereof, that the records and proceedings aforesaid being inspected, the Supreme Court may cause further to be done herein to correct that error, what of right and according to the law and customs of the United States, should be done.

Witness: The Honorable Edward Douglass White, Chief Justice of the United States Supreme Court, this 4th day of March, in the year of our Lord, One Thousand, Nine Hundred and Sixteen.

[Seal United States District Court, District of Arizona.]

MOSE DRACHMAN,  
*Clerk of the United States District Court*  
*in and for the District of Arizona,*  
 By EFFIE D. BOTTS,  
*Deputy Clerk.*

Allowed by  
 WM. H. SAWTELLE,  
*Judge of the United States District Court*  
*in and for the District of Arizona.*

Service of within writ of error by receipt of true copy admitted, this, the 4 day of March, 1916.

FRANK E. CURLEY,  
*Attorney for Defendant in Error.*

142½ [Endorsed:] No. 44 Tucson. In the District Court of the United States, in and for the District of Arizona. The Arizona Copper Company, Limited, a Corporation, Plaintiff in Error, vs. Richard Bray, Defendant in Error. Order. W. C. McFarland and H. A. Elliott, Attorneys for Plaintiff in Error. Filed March 4 A. D. 1916. Mose Drachman, Clerk, by Effie D. Botts, Deputy Clerk.

143 In the District Court of the United States in and for the District of Arizona.

THE ARIZONA COPPER COMPANY, LIMITED, a Corporation, Plaintiff  
 in Error,

vs.

RICHARD BRAY, Defendant in Error.

*Citation.*

UNITED STATES OF AMERICA, ss:

The President of the United States of America to Richard Bray and to L. Kearney and Frank E. Curley, your attorneys, greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, at Washington, D. C., on the 1st day of May, 1916, pursuant to a writ of error filed in the Clerk's Office of the United States District Court, in and for the District of Arizona, wherein The Arizona Copper Company, Limited, is Plaintiff in Error and you, Richard Bray, are Defendant in Error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness: The Honorable William H. Sawtelle, Judge of the United States District Court, in and for the District of Arizona, this 4th day of March, A. D., 1916.

WM. H. SAWTELLE,  
*Judge of the United States District Court  
in and for the District of Arizona.*

144-145 Service of within citation by receipt of a true copy admitted this 4 day of March, 1916.

FRANK E. CURLEY,  
*Attorney for Defendant in Error.*

146 [Endorsed:] No. 44 Tucson. In the District Court of the United States, in and for the District of Arizona. The Arizona Copper Company, Limited, a Corporation, Plaintiff in Error, vs. Richard Bray, Defendant in Error. Citation. W. C. McFarland and H. A. Elliott, Attorneys for Plaintiff in Error. Filed March 4 A. D. 1916, at — M. Mose Drachman, Clerk, by Effie D. Botts, Deputy Clerk.

Endorsed on cover: File No. 25,286. Arizona D. C. U. S. Term No. 478. The Arizona Copper Company, Limited, plaintiffs in error, vs. Richard Bray. Filed May 9th, 1916. File No. 25,286.



IN THE  
**Supreme Court of United States**

OCTOBER TERM, 1916.

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THE ARIZONA COPPER COM- PANY, Limited,	}	No. 478.
<i>Plaintiff in Error,</i>		
v.		
RICHARD BRAY,	}	
<i>Defendant in Error.</i>		

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**MOTION TO DISMISS AND TO AFFIRM  
AND BRIEF IN SUPPORT THEREOF.**

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MOTION.

Comes now the defendant in error above named and moves this Honorable Court to dismiss the writ of error and appeal herein, upon the following grounds:

(1) For want of jurisdiction in this court to entertain said appeal.

(2) Because no appeal herein was taken or perfected within the time required by law, in that the order allowing the writ of error was on March 4, 1916, and the record herein was not filed in this court until May 9, 1916.

(3) Because the appellant claims as ground for appeal that the Employers' Liability Law, Chap. 6 of Title 14 Revised Statutes of Arizona, 1913, is in violation of Sections 5 and 7 of Article 18 of the Constitution of Arizona, which claim is unfounded, frivolous and presents no question for the consideration of this court.

(4) Because the appellant claims that the Employers' Liability Law, Chap. 6 of Title 14, Revised Statutes of Arizona, 1913, violates the fourteenth amendment of the Constitution of the United States, which is its sole excuse for this appeal, and which contention is frivolous and without merit, and on other grounds stated in the annexed brief.

That said defendant in error also moves this court to affirm the judgment of the district court upon the following grounds:

(a) On the grounds stated in No. 3 in above motion to dismiss, and on the further grounds, to-wit:

(b) That under the provisions of the Employers' Liability Law, Chap. 6 of Title 14, Revised Statutes of Arizona, 1913, in the United

States District Court for the District of Arizona, the plaintiff below recovered a judgment against the defendant for a personal injury, and that under the provisions of Sec. 238 of the Judicial Code of the United States the plaintiff in error has prosecuted an appeal from that judgment to this court under the claim that said Employers' Liability Law is in violation of the fourteenth amendment of the Constitution of the United States, which claim is untenable, without merit and is the sole excuse for the invocation of the appellate jurisdiction of this court, which in fact does not involve the construction of said Arizona law, and that only general questions of a non-federal character are presented for review, and no plain error, or error at all, was committed by the court below in trying the case, and that the questions on which the decision of the cause depend are so frivolous as not to require argument, and upon the further grounds stated in the annexed brief, and that it is manifest from the record of this cause that the writ is prosecuted only for delay, which is prejudicial to the rights of the defendant in error, in consequence of which the defendant in error respectfully prays that the judgment below be affirmed with damages as prescribed in Rule 23 of this court upon the affirmance of the judgment herein, and with 12 per cent interest as provided for by Sec. 3161 of said Arizona statute, and in the event that said affirmance

be not granted, then defendant in error prays that the cause be transferred for hearing to a summary docket.

Respectfully submitted,

FRANK H. HEREFORD AND  
~~FRANK E. CUBLEY,~~

Tucson, Arizona,  
*Attorneys for Defendant in Error.*

Sirs:

Please take notice that the foregoing motions will be submitted to the court at the City of Washington, in the District of Columbia, on the 9th day of October, 1916, at the opening of the court on that day, or as soon thereafter as counsel can be heard.

Yours truly,  
FRANK H. HEREFORD AND  
~~FRANK E. CUBLEY,~~

Tucson, Arizona,  
*Attorneys for Defendant in Error.*

Dated this .... day of August, 1916.

To

W. C. McFARLAND AND  
H. A. ELLIOTT,

*Attorneys for Plaintiff in Error,*  
Clifton, Arizona.

IN THE  
**Supreme Court of United States**

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THE ARIZONA COPPER COM-  
PANY, Limited,

*Plaintiff in Error,*

v.

RICHARD BRAY,

*Defendant in Error.*

No. 478.

---

**MOTION TO DISMISS AND TO AFFIRM  
AND BRIEF IN SUPPORT THEREOF.**

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STATEMENT.

This is a motion under Rule VI to dismiss the writ of error and appeal, and to affirm the judgment herein.

The cause is here upon a writ of error directed to the District Court of the United States for the District of Arizona to review a judgment entered in said District Court.

The action was brought by Richard Bray as the plaintiff in the trial court against the plaintiff in error here, under the Employers' Liability Law, Chap. 6 of Title 14, Revised Statutes of Arizona, 1913, to recover damages for personal injuries received by him at Morenci, Arizona, while in the employ of plaintiff in error as a miner, on August 4, 1914, and resulted in a judgment in favor of plaintiff below upon a verdict in the sum of \$9,184.55.

The writ of error was allowed on March 4, 1916, transcript of record, p. 123, and the record was filed in this court on May 9, 1916, more than sixty days had expired after writ allowed before record was filed.

#### CONSTITUTION OF ARIZONA.

Sections 4, 5, 6 and 7, of Article 18 of Constitution of Arizona, are as follows:

"Sec. 4. The common law doctrine of fellow servant, so far as it affects the liability of a master for injuries to his servant resulting from the acts or omissions of any other servant or servants of the common master is forever abrogated.

Sec. 5. The defense of contributory negligence or of assumption of risk shall, in all cases whatsoever, be questions of fact and shall, at all times, be left to the jury.

Sec. 6. The right of action to recover damages for injuries shall never be abrogated, and

the amount recovered shall not be subject to any statutory limitation.

Sec. 7. To protect the safety of employees in all hazardous occupations, in mining, smelting, manufacturing, railroad or street railway transportation, or in any other industry the legislature shall enact an *Employers' Liability Law*, by the terms of which any employer, whether individual, association or corporation shall be liable for the death or injury, caused by any accident due to a condition or conditions of such occupation of any employee in the service of such employer in such hazardous occupation, in all cases in which such death or injury of such employee shall not have been caused by the negligence of the employee killed or injured."

The Employers' Liability Law, approved May 24, 1912, now known as Chapter 6 of Title 14, Revised Statutes of Arizona, 1913, so far as the same has any bearing on the questions at bar, is as follows:

"Sec. 3153. This chapter is and shall be declared to be an employers' liability law as prescribed in Section 7 of Article XVIII of the state constitution.

3154. That to protect the safety of employees in all hazardous occupations in mining, smelting, manufacturing, railroad, or street railway transportation, or any other industry, as provided in Section 7 of Article XVIII of the state constitution, any employer, whether individual, association or corporation, shall be liable for the death or injury, caused by any accident due to a condition or conditions of such occupation, of any employee in the service of such employer in such hazard-



ous occupation, in all cases in which such death or injury of such employee shall not have been caused by the negligence of the employee killed or injured.

3155. The labor and services of workmen at manual and mechanical labor, in the employment of any person, firm, association, company, or corporation, in the occupations enumerated in the next section hereof, are hereby declared and determined to be service in a hazardous occupation within the meaning of the terms of the preceding section.

By reason of the nature and conditions of, and the means used and provided for doing the work in, said occupations, such service is especially dangerous and hazardous to the workmen therein, because of risk and hazards which are inherent in such occupations and which are unavoidable by the workmen therein.

3156. The occupations hereby declared and determined to be hazardous within the meaning of this chapter are as follows:

(1) The operation of steam railroads, electric railroads, street railroads, by locomotives, engines, trains, motors, or cars of any kind propelled by steam, electricity, cable or other mechanical power, including the construction, use or repair of machinery, plants, tracks, switches, bridges, roadbeds, upon, over and by which such railway business is operated.

(2) All work when making, using or necessitating dangerous proximity to gunpowder, blasting powder, dynamite, compressed air or any other explosive.

(3) The erection or demolition of any bridge, building or structure in which there is, or in which the plans and specifications require, iron or steel framework.

(4) The operation of all elevators, elevating machines or derricks or hoisting apparatus used within or on the outside of any bridge, building or other structure for conveying materials in connection with the erection or demolition of such bridge, building or structure.

(5) All work on ladders or scaffolds of any kind elevated twenty feet or more above the ground or floor beneath in the erection, construction, repair, painting or alteration of any building, bridge, structure or other work in which the same are used.

(6) All work of construction, operation, alteration or repair where wires, cables, switchboards, or other apparatus or machinery are in use charged with electrical current.

(7) All work in the construction, alteration, or repair of pole lines for telegraph, telephone or other purposes.

(8) All work in and about quarries, open pits, open cuts, mines, ore reduction works and smelters.

(9) All work in the construction and repair of tunnels, subways and viaducts.

(10) All work in mills, shops, works, yards, plants and factories where steam, electricity, or any other mechanical power is used to operate machinery and appliances in and about such premises.

3157. Every employer, whether individual, firm, association, company or corporation, employing workmen in such occupation, of itself or through an agent, shall by rules, regulations and instructions, informs all employees in such occupations as to the duties and restrictions of their employment, to the end of protecting the safety of employees in such employment.

3158. When in the course of work in any of the employments or occupations enumerated in the preceding section, personal injury or death by any accident arising out of and in the course of such labor, service and employment, and due to a condition or conditions of such occupation or employment, is caused to or suffered by any workman engaged therein, in all cases in which such injury or death of such employee shall not have been caused by the negligence of the employee killed or injured, then the employer of such employee shall be liable in damages to the employee injured, or, in case death ensues, to the personal representative of the deceased for the benefit of the surviving widow or husband and children of such employee; and, if none, then to such employee's parents; and, if none, then to the next of kin dependent upon such employee; and, if none, then to his personal representative, for the benefit of the estate of the deceased.

3161. In all actions for damages brought under the provisions of this chapter, if the plaintiff be successful in obtaining judgment, and if the defendant appeals to a higher court, and if the plaintiff in the lower court be again successful; and the judgment of the lower court is sustained by the higher court or courts; then and in that event the plaintiff shall have added to the amount of such judgment by such higher court or courts, interest at the rate of 12 per cent per annum on the amount of such judgment from the date of the filing of the suit in the first instance until the full amount of such judgment is paid."

#### Point I.

It is obvious that the above statute conforms to the provisions of Sec. 7, of Article 18 of the

Constitution of Arizona, and is not open to the question that it violates the fourteenth amendment of United States Constitution. On such question an appeal was dismissed in case of *East-erling Lumber Company v. Pierce*, 235 U. S. 380, 59 L. ed. 279; *Jeffrey Mfg. Co. v. Blagg*, 235 U. S. 571, 59 L. ed. 364; *Brolan v. United States*, 236 U. S. 216, 59 L. ed. 545.

#### Point II.

Sec. 5 of Article 18 of Constitution of Arizona has no application to the Employers' Liability Law, but pertains to common law actions for negligence.

*Consolidated Arizona Smelting Co. v. Ujack*, 139 Pac. (Ariz.) 465.

#### Point III.

Of course the record was not filed in this court within the time required by law, and whether the court will dismiss for that reason or not is discretionary.

The real excuse for this case being in this court is the claim that the Arizona employers' liability act offends against the fourteenth amendment of the Constitution of the United States. On the slightest inspection this claim is so wholly wanting in merit as to be frivolous, and for that

reason the court may decline to take jurisdiction and dismiss the appeal as was done in cases—

*Brolan v. United States*, 236 U. S. 216;  
*Goodrich v. Ferris*, 214 U. S. 71, 53 L. ed. 914;  
*Arbuckle v. Blackburn*, 191 U. S. 405, 48 L. ed. 239;  
*Easterling Lbr. Co. v. Pierce*, 235 U. S. 279;  
*Vandellia Ry. Co. v. Stillwell*, 36 Sup. Ct. 445.

The same character of statute has been so many times before this court for consideration and before so many other courts that all questions as to their constitutionality may now be regarded as well settled, and furnishes no excuse for an appeal to this court on that question, and that such statutes do not offend against the fourteenth amendment of United States Constitution has been many times declared by this court.

*Northern Pacific Railway Co. v. Meese*, 239 U. S. 614;  
*Easterling Lumber Co. v. Pierce*, 235 U. S. 380, 59 L. ed. 279;  
*Jeffrey v. Blagg*, 235 U. S. 571, 59 L. ed. 364;  
*Chicago etc. v. McGuire*, 219 U. S. 549, 55 L. ed. 328;  
*Chicago Ind. L. Ry. Co. v. Hacket*, 228 U. S. 559, 57 L. ed. 966;  
*Western Indemnity v. Pillsbury*, 151 Pac. (Cal.) 398.

We will briefly consider appellant's assignment of errors (Tr. pp. 113-117).

Assignment I is entirely without merit.

Assignment of Error II claims that the Arizona Employers' Liability Law is in violation of fourteenth amendment of United States Constitution, by subjecting appellant to unlimited liability without fault. This contention is answered by the above authorities and such claim is without merit. It is no objection to the statute that it deprives the appellant of property without its fault.

See *Stertz v. Industrial Insurance Commission*, 158 Pacific Rep. 256 (pamphlet July 24, 1916, advance sheet), where authorities are collated;

*Chicago, Rock Island & Pac. Ry. Co. v. Zerneck*, 183 U. S. 582, 46 L. ed. 339;

*State v. Clausen*, 65 Wash. 156, 117 Pac. 1101;

*Western Indemnity v. Pillsbury*, 151 Pac. 398.

Because the employer's liability act places no restrictions as to the amount of damages recoverable is no valid objection, and therefor no limitation applies except that of the damages actually sustained.

*Sweet v. Chicago etc. R. Co.*, 157 Wis. 400, 147 N. W. 1054;

*Devine v. Chicago etc. R. Co.*, 266 Ill. 248, 107 N. E. 595.

## ASSIGNED ERROR III.

This assignment, like the former, is without merit. The court was right in overruling appellant's special demurrer No. 2, because the question of contributory negligence is not in this case. As we have seen, the Arizona statute makes the defendant liable without fault. The language of the Arizona statute is:

*"Any employer, \* \* \* shall be liable for the death or injury, caused by any accident due to a condition or conditions of such occupation, of any employee in the service of such employer in such hazardous occupation, in all cases in which such death or injury of such employee shall not have been caused by the negligence of the employee killed or injured."*

The question is, was the defendant in error guilty of negligence and did his negligence cause his injury? If it did, he cannot recover. If plaintiff below was not guilty of negligence he was entitled to verdict whether defendant was guilty of negligence or not, and that question was properly presented to the jury in the court's charge. What is the use in giving a charge on contributory negligence when the defendant is liable, whether it was, or was not, guilty of negligence? Under the Arizona law the only question the court could instruct the jury on was whether or not the plaintiff's injuries were caused by his own negligence, and not on the negligence of the defendant, be-



cause the defendant is liable for an accident due to a condition of such occupation, in such hazardous occupation, without fault. Under this statute the question of the defendant's negligence is entirely removed, and the doctrine of comparative negligence is taken out of the statute by virtue of the provisions of Sec. 7 of Article 18 of Arizona Constitution.

"Contributory negligence on the part of plaintiff necessarily assumes negligence on the part of defendant."

29 Cyc. 506, citing cases in note 44, and  
*Hammer v. Railroad Co.*, 128 Ky. 486, 108  
 S. W. 885;  
*Lime Co. v. Affleck*, 115 Va. 643, 79 S. E.  
 1054;  
*Ariz. East. R. Co. v. Bryan*, 157 Pac. 380,  
 first column.

#### ASSIGNED ERROR IV.

The court was right in overruling plaintiff in error's special demurrer No. 7, because the doctrine of assumption of risk has been removed by the Arizona statute and Sec. 7 of Art. 18 of its constitution, and the employer rendered liable for an injury caused by an accident due to a condition of such occupation in a hazardous employment named in the statute.

*Stertz v. Industrial Ins. Com.*, 158 Pac.  
 (Wash.) 260 (pamphlet);  
*Western Indemnity v. Pillsbury*, 151 Pac.  
 (Cal. 398.

## ASSIGNED ERROR V.

This assignment is without merit.

## ASSIGNED ERROR VI.

The court did not err in striking out that part of the answer set out in assigned error VI, which states that plaintiff's injuries arose from his "*own want of care*," because the statute uses the word "*negligence*," and not "*care*," and the defense of negligence was left to defendant, and further, it was incumbent on plaintiff to make out, by a preponderance of the evidence, that his injuries were not caused by his own negligence, and the court so instructed the jury (Tr. p. 103).

## ASSIGNED ERROR VII.

The court was right in sustaining a demurrer to that part of the answer, paragraph 4 on page 6, because it set up the doctrine of assumption of risk, and that defense has been removed by the Arizona statute. What has been said under assigned errors III and IV, *supra*, is applicable as an answer to assigned error VII.

## ASSIGNED ERROR VIII.

The court was right in sustaining an objection to the question asked Mr. Bray as to what he told Doctor Goodrich, because it was shown by the evidence that the relation of physician

and patient existed between Mr. Bray and Doctor Goodrich, and such conversation was privileged (Tr. p. 30), which discloses a different question than the one embodied in said assigned error VIII, which is not found in the record. Further, there was no exception taken to ruling of the court (Tr. p. 30).

A patient could not be compelled to disclose communications which his physician would not be permitted to disclose.

*Verdelli v. Gray's Harbor Com. Co.*, 115 Cal. 517.

Giving testimony by the patient as to the communications is a waiver of the privilege and is a consent that the physician may testify.

*Armstrong v. Topeka Ry. Co.*, 144 Pac. (Cal.) 850;

*Arizona & N. M. R. Co. v. Clark*, 235 U. S. 669, 59 L. Ed. 415, on the Arizona statute.

#### ASSIGNED ERROR IX.

This assigned error, like the preceding one, is not in the record, and if it were, it is without merit.

#### ASSIGNED ERROR X.

It will be seen by the record (Tr. p. 70), that no exception was taken to the ruling of the court

in sustaining an objection to the question. Further, what was or was not, the common practice was unimportant evidence.

#### ASSIGNED ERROR XI.

The assignment is too general to present any question for review, further, all testimony is not before the court, the depositions taken at Salt Lake are not made a part of the bill of exceptions.

#### ASSIGNED ERROR XII.

This assigned error is without merit. The definition given by the court as to what constituted "conditions of employment" is about correct, and certainly did the appellant no harm.

#### ASSIGNED ERROR XIII.

This assignment is without merit, and further, all testimony is not before the court.

#### ASSIGNED ERRORS XIV, XV, XVI.

are without merit and are entirely frivolous.

Since, therefore, it appears that no constitutional question is presented and that no plain error is disclosed by the record, that the character of the case is such as not to require or to be entitled to receive from the court more than a summary inspection and examination of the record,

and that such examination and inspection, even if extended to the most searching scrutiny, would inevitably result in a dismissal or affirmance of the judgment below, we respectfully submit that the cause should be dismissed or the judgment of the lower court should be affirmed.

Should these motions be denied, we respectfully submit that this cause is of such a character as not to justify extended argument, it should be transferred for hearing to the summary docket. Since it clearly appears that this writ is prosecuted only for delay to the prejudice of the defendant in error, and is in reality frivolous, we respectfully submit that damages should be awarded to the defendant in error pursuant to Rule 23 of this court, and that 12 per cent interest be added to the judgment from the time of the filing of the complaint herein, June 17, 1915, as provided for by the provisions of Sec. 3161, Revised Statutes of Arizona, 1913.

Respectfully submitted,

FRANK H. HEREFORD ~~AND~~

~~FRANK E. CULLEY,~~

Tucson, Arizona,

*Attorneys for Defendant in Error.*



FILE

OCT 9 1916

JAMES D. MA

# Supreme Court of the United States.

OCTOBER TERM, 1916.

No.  1  21

THE ARIZONA COPPER COMPANY, LIMITED,  
*Plaintiff in Error,*

*v.*

RICHARD BRAY,  
*Defendant in Error.*

**BRIEF FOR PLAINTIFF IN ERROR,**  
on motion to dismiss and affirm.

JOHN A. GARVER,  
W. C. MCFARLAND,  
*Counsel for Plaintiff in Error.*





IN THE  
Supreme Court of the United States,

OCTOBER TERM, 1916.

No. 478.

THE ARIZONA COPPER COMPANY,  
LIMITED,

*Plaintiff in error,*

v.

RICHARD BRAY,  
*Defendant in error.*

Brief for plaintiff in  
error, on motion to  
dismiss and affirm.

Motion by defendant in error to dismiss and affirm, under  
Rule 6.

**Statement.**

This action was brought by the defendant in error, in the United States District Court for the District of Arizona, to recover damages for personal injuries alleged to have been sustained by him while working in the defendant's mine. A verdict was rendered in his favor for \$9,000.

As stated in the brief for the defendant in error (p. 6), the action was brought under the Employers' Liability Law of Arizona, which makes employers in certain hazardous occupa-

tions, including mining, liable, to an unlimited extent, for injuries sustained as the result of an accident due to conditions of the occupation, where the injury has not been due to the negligence of the injured employee. The liability is imposed irrespective of any negligence or fault on the part of the employer.

The provisions of the Arizona Constitution and of the Employers' Liability Law are set forth in the brief for the defendant in error, with the exception of one very important Section of the Law (Sec. 3159), permitting the defenses of assumption of risk and contributory negligence, which will be hereafter referred to (*post*, p. 11). These defenses were set up in the answer, but were stricken out by the Court; and exceptions were duly taken (Record, pp. 8-10).

A demurrer to the complaint, on the ground that the Employers' Liability Act was unconstitutional, because it deprived the Company of its property without due process of law and of the equal protection of the law, under the Fourteenth Amendment, was overruled; and an exception was duly taken (Record, pp. 5, 10). The same ground was urged upon motions for the dismissal of the complaint, when the case was moved for trial and at the close of the entire case. The motions were denied and exceptions taken (Record, pp. 12, 110); and this ground was expressly relied upon by the plaintiff in error in the assignments of error (Record, p. 113).

## POINTS.

### FIRST.

#### This Court has jurisdiction.

I. An appeal lies directly to this Court from the District Court, where the case involves the application of the Constitution of the United States.

Judicial Code, Sec. 238.

II. Counsel for the defendant in error, in their notice of motion, concede (p. 2) that a constitutional question is asserted by the plaintiff in error and merely urge that the question is frivolous; and this concession is also made in their brief (p. 11).

III. The plaintiff in error specifically asserted a right under the Fourteenth Amendment, which the Court below decided adversely to his contention (Record, pp. 5, 10, 12, 110).

Section 1230 of the Revised Statutes of Arizona (1913) provides :

“ Upon an appeal from a final judgment, the Supreme Court may review any intermediate order involving the merits and necessarily affecting the judgment.”

This Court will follow the State practice, in the case of appeals in actions at law.

Fitzpatrick v. Flannagan, 106 U. S., 648.

And, independently of the State practice, so long as the record shows that the constitutional question was raised and considered by the lower court, even though that appears only in the opinion of the court, this Court will assume jurisdiction.

Loeb v. Columbia Township Trustees, 179 U. S.,  
472, 477.

## **SECOND.**

### **Alleged irregularity in the record.**

I. Counsel for defendant in error are mistaken in their assertion that the record was not filed in this Court until May 9, 1916. While a statement to that effect appears upon the printed record, as a matter of fact the record was received by the Clerk of the Court on April 29, 1916.

II. Even, however, if there had been a ten days' delay in filing the record, it would afford no ground of complaint now, inasmuch as the record was duly completed and printed months before the opening day of the session. A motion to dismiss will not be seriously entertained by this Court upon such facts.

Sparrow v. Strong, 3 Wall., 97, 103.

The defendant in error should himself have proceeded regularly, under Rule 9, if he desired to make a motion to dismiss on the ground of such a technical irregularity.

Southern Pine Co. v. Ward, 208 U. S., 126, 136.

## **THIRD.**

### **The constitutional question a novel one and of great importance.**

I. Employers' Liability Acts and Workmen's Compensation Acts are now in existence in many of the States; and they have also been adopted by the Congress of the United States. They are for the most part of recent origin, scarcely any of them dating back more than six or eight years, while

many of them have taken effect only within the past three or four years. With the limitations and restrictions and optional or reciprocal provisions contained in them, they have been very generally recognized as valid exercises of the police power of the state. But a statute which imposes an *unlimited* liability upon an employer, without fault on his part and without any attempt at mutuality for the protection of both employer and employed, has never yet, so far as we are aware, been passed upon by this Court or held valid by any State court of last resort. In the case of the Federal Employers' Liability Act (35 Stat. L. 65), negligence on the part of the employer must be established; and in the case of the Federal Compensation Law (35 Stat. L. 556), the liability is strictly limited to a year's wages.

The theory of nearly all the legislation on the subject has been that, in the interest of society, hazardous occupations should themselves be charged with the reasonable burden of sustaining the inevitable loss resulting from the inherent risks of the business, which no ordinary care or foresight can guard against, and that a liability or insurance fund should be created by a tax upon the business, which, on the one hand, will afford substantial compensation to the injured employee, and, on the other hand, will protect the employer from uncertain and possibly ruinous verdicts that might bankrupt the business, to the injury, not only of the particular employer and of all other workmen employed by him, but of society generally. In all legislation of that kind which thus far has been upheld, there is some mutuality in the apportionment of the risk, some attempt to reach a scientific basis of compensation, established, usually, upon a percentage of the impairment of wages, and some recognition of maximum and minimum compensation, which will enable the employer to conduct his business on an approximate estimate of the risk that he is obliged to assume. But legislation which exposes the innocent employer to the mere caprice and prejudices of different juries,

where nothing is certain except that no two juries will bring in the same verdict upon the same state of facts, not only has the effect of depriving the employer of his property without due process of law, but, in its nature, must be prejudicial to the best interests of society, as tending to make capital shrink from employment in occupations where such uncertainties exist.

The magnitude and gravity of the subject are well exemplified in the extended discussion devoted to it by the New York Court of Appeals in the famous case of *Ives v. South Buffalo Ry. Co.* (201 N. Y., 271), in which the decision of the Court was unanimous, and was concurred in in a separate opinion by CULLEN, C. J., whose great ability and exceptional learning in the realm of constitutional law are widely recognized. The reasoning in that case is directly applicable to the case at bar, on the question of the power of the legislature to impose liability without fault; but the liability imposed by the statute there under consideration was not unlimited, so that the Arizona statute is a much more flagrant violation of constitutional limitations than the New York statute, which was declared void.

The distinction between a case where the law places an unlimited liability on the innocent employer and a case where a new and exclusive method of compensation for industrial accidents is provided by a system of compulsory insurance, the amount of compensation being strictly limited and dependent upon the degree of injury, is well exemplified in the very careful Workmen's Compensation Law which was passed by the New York Legislature, after an amendment to the State Constitution, made as a result of the decision in the *Ives* case (L. 1913, Ch. 816). This statute has been upheld by the Court of Appeals, in a decision which points out clearly the principles on which legislation of this kind can be sustained and the limitations which must be placed upon it in order to render it constitutional.

*Jensen v. Southern Pacific Co.*, 215 N. Y., 514.

II. While the entire subject of appropriate legislation to provide against the hardships resulting from accidents which occur in hazardous occupations, without fault, is of very recent origin, its importance is shown by the careful and extended discussion which has been devoted to it by all the state courts which have had occasion to consider any of the questions involved. As will be shown in the next Point, this Court has passed on the subject only incidentally; and none of the state courts have had presented to them a statute similar to the one involved in this case.

Such legislation marks a distinct departure from the well settled and long established principles of the common law; and, until this Court has passed upon it in its various phases, it is assuredly not frivolous for an employer who is vitally interested, to request a hearing upon his contention that the law deprives him of his constitutional rights. In the case of the plaintiff in error, it is not merely the judgment in this particular case, nor the larger judgment in a similar case now before the Court (No. 477), but the continuous liability to which it will be exposed, if the statute and constitutional provision should be held to be valid.

#### **FOURTH.**

**No previous decision by this Court on the subject.**

I. No previous decision upon the point now presented has been rendered by this Court, so far as we have been able to ascertain; and, although Workmen's Compensation and Employers' Liability Laws have been the subject of widespread discussion during the past few years in nearly all the courts of the country, none of the courts of last resort have passed upon the question involved in the present case.

That is doubtless due to the fact that no other legislation has yet gone to the extreme extent of subjecting an employer to *unlimited* liability, without any fault on his part and without any compensating obligation on the part of the employed. Always, heretofore, it has been a fundamental and sacred principle of our jurisprudence that no one could be subjected to liability for damages without fault of some kind.

Nitro-Glycerine Case, 15 Wall., 524, 527.

The statutes of this kind which have been held valid provide a new and exclusive method, by which persons engaged in certain industries may be compensated for injuries inevitably resulting from the nature of the employment. This unavoidable hazard is met by reciprocal concessions of absolute right by employees as well as employers, including frequently the right to trial by jury. But that is not the method adopted by the Legislature of Arizona. While the Legislature of that State also passed a Workmen's Compensation Law (Rev. Stat. Title 14, Ch. VII), it was made compulsory only upon the employer. The employee is left free to accept the compensation, or to pursue his common law remedy, or to bring an action under the Employers' Liability Act, where, without showing any fault on the part of the employer, he has the absolute right to appeal to the jury for the highest award of damages possible.

Consolidated Arizona Smelting Co. v. Ujack, 15 Ariz., 382.

In the present case, the judgment demanded was \$50,000 (Record, p. 3).

II. Various cases are cited in the brief for the defendant in error as controlling ; but not one of them is in point, and all of them are readily distinguishable from the present case.

1. The cases holding that it is competent for the legislature to deprive employers of the defenses of



assumption of risk, contributory negligence and negligence of a fellow servant, are obviously not in point, as was shown in the Ives case (201 N. Y., 271, 288-9). The legislature has the undoubted power to impose certain obligations on employers in connection with insurance or protection of their employees ; and refusal to allow these defenses to be made has usually been sustained as a penalty for failing to comply with the legislative regulations.

C. B. & Q. R. Co. v. McGuire, 219 U. S., 549 ;  
Chicago, etc. Ry. Co. v. Hackett, 228 U. S., 559 ;  
Easterling Lumber Co. v. Pierce, 235 U. S., 380 ;  
Jeffrey Manufacturing Co. v. Blagg, 235 U. S., 571.

2. Similar to the foregoing are the cases holding that the legislature may require railroad companies to fence their tracks and may make them liable if they fail to do so.

Missouri Pac. Ry. Co. v. Humes, 115 U. S., 512 ;  
Minneapolis Ry. Co. v. Beckwith, 129 U. S., 26.

In the absence of a statutory duty to construct fences, it has been held that legislation which imposes a liability upon railroad companies for injuries to cattle on their tracks is unconstitutional.

Ziegler v. S. & N. Ala. R. R. Co., 58 Ala., 595 ;  
Billenberg v. Montana U. Ry. Co., 8 Mont., 271 ;  
Jensen v. Railway Co., 6 Utah, 253 ;  
Ohio, etc. Ry. Co. v. Lackey, 78 Ill., 271.

The correctness of these latter decisions may be questioned ; because, the very fact that a railroad company has the power of eminent domain and can acquire and operate a strip of land across farms which were previously fenced for the protection of cattle may be held to throw a duty upon the company to provide such protection and to so operate its property as not to

cause injuries to which the adjacent owners were not previously exposed.

3. The recent decisions of the courts of last resort in Washington, California and Texas, upholding the Workmen's Compensation Acts of those States, are not authorities in favor of the Arizona Employers' Liability Law, because they deal with statutes which, like the New York statute previously referred to (*ante*, p. 6), provide graduated systems of compensation for industrial accidents, which are exclusive and compulsory for both employers and employed.

*City ex rel. Clausen v. Burr*, 65 Wash., 156 ;  
*Stortz v. Industrial Insurance Commission*, 158  
 Pac., 256 (Wash., 1916) ;  
*Western Indemnity Co. v. Pillsbury*, 170 Cal., 686 ;  
*Middleton v. Texas Power & Light Co.*, 185 S. W.,  
 556 (Tex., 1916).

4. The only case in this Court cited by defendant in error, which is even remotely in point, is

*Ch., R. I. & Pac. Ry. Co. v. Zerneck*, 183 U. S.,  
 582.

That was a case where a Nebraska statute made railroad companies, without fault, liable for injuries to passengers. The Court held that this statute had been accepted by the company as part of its charter, which, of course, disposed of the case. But, in the course of its opinion, the Court suggested that the legislation might also be upheld on the theory that, at common law, railroad companies were liable as insurers of goods, and that this was merely an extension of the well recognized principle of the common law to make them insurers of the safety of their passengers. But, as Mr. Justice McKenna pointed out in his opinion in that case, this unlimited liability of railroad companies was the out-

growth of the decision in *Coggs v. Bernard* (2 *Ld. Raym.*, 909) ; and Chief Justice MARSHALL, in *Boyce v. Anderson* (2 *Pet.*, 150), characterized the principle as "one of great rigor," which should not be carried further or applied to new cases.

5. *Northern Pac. Ry. Co. v. Meese*, 239 U. S., 614.

In that case, this court considered only one phase of the Workmen's Compensation Law of Washington, namely, whether it deprived employees of their common law remedy against third parties, when they were injured in the course of their employment. This Court adopted the construction which the Supreme Court of Washington had placed on the statute on this point; but the constitutionality of the statute, as a whole, was not considered. As already pointed out, however (*ante*, p. 10), the Washington statute is entirely unlike the Arizona statute.

## FIFTH.

### **Plaintiff in error deprived by Court below of constitutional defenses.**

I. Where this Court has jurisdiction, by reason of the existence of a constitutional question, it will review all the questions of law involved in the case.

*Brolan v. United States*, 236 U. S., 216.

II. Section 5, of Article 18, of the Arizona Constitution is as follows :

"The defense of contributory negligence or of assumption of risk shall, in all cases whatsoever, be questions of fact and shall at all times be left to the jury."

III. The plaintiff in error pleaded in his answer the defenses of the assumption of risk and contributory negligence. These defenses were stricken out; and exceptions to the rulings of the Court were duly taken (Record, pp. 8-10).

Counsel for defendant in error state that the very comprehensive and emphatic provision of the Constitution has been held by the Supreme Court of Arizona to apply only to actions at common law, citing

Cons. Ariz. Smelting Co. v. Ujack, 15 Ariz., 383.

As a matter of fact, the question was not even considered in that case, the action being one at common law, and the only question being whether it was barred by an election to accept compensation under the Workmen's Compensation Act (an entirely different statute from the Employers' Liability Law). Even if that case had decided the point, it would be of no importance, because Section 3159 of the Employers' Liability Act expressly provides that these two defenses shall be available in an action brought under that Act.

Section 3159 is as follows :

" In all actions hereafter brought against any such employer under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to any employee, or where such injuries have resulted in his death, the question whether the employee may have been guilty of contributory negligence, or has assumed the risk, shall be a question of fact and shall at all times, regardless of the state of the evidence relating thereto, be left to the jury, as provided in section 5 of article XVIII of the state constitution ; provided, however, that in all actions brought against any employer, under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee."

That is the Section which counsel for the defendant in error have omitted from the copy of the Act contained in their brief (pp. 6-10), and which they assume to give in full, "so far as the same has any bearing on the questions at bar" (p. 7)!

IV. In excluding these defenses, the District Court manifestly committed reversible error.

### **SIXTH.**

**The cause should not be transferred to the summary docket.**

It is probable that the motion to dismiss and affirm was made merely to have the cause transferred for hearing to the summary docket. Owing, however, to the novelty and importance of the constitutional question involved and to the fact that other questions have been raised by the assignments of error, which, with one exception, it has not been thought necessary to discuss in this brief, the motion should be denied unconditionally, so that full time may be allowed for the argument. This is no hardship to the defendant in error, in view of the unusual provision contained in the Arizona statute (Sec. 3161, set forth in the brief for defendant in error, p. 10), requiring the payment of interest at 12% per annum upon any judgment obtained under the Employers' Liability Act, which is affirmed by the appellate court. It may be questioned whether such a severe penalty as this, upon the right of appeal in the case of unlimited liability, does not in itself render the Act void.

**SEVENTH.**

**The motion should be denied.**

Washington, October 9, 1916.

JOHN A. GARVER,

W. C. MCFARLAND,

Counsel for plaintiff in error.

**In the Supreme Court  
of the United States**

OCTOBER TERM, 1917

<b>The Arizona Copper Company, Limited,</b>	}	No. 162
Plaintiff in error,		
vs.		
<b>Richard Bray,</b>		
Defendant in error.		

---

**BRIEF OF DEFENDANT IN ERROR**

This action was commenced in the United States District Court for the District of Arizona at Tucson under Paragraph Six, Title Fourteen, Revised Statutes of Arizona, 1913, known as the "Employers' Liability Law," to recover for injuries received by defendant in

error while in the employ of plaintiff in error in the operation of its mines.

Upon the trial of the case in the District Court at Tucson before a jury, a verdict was returned in favor of defendant in error in the sum of Nine Thousand (\$9,000) Dollars, upon which judgment was entered and from which this appeal was prosecuted.

This case was tried in the lower court immediately following that of Joseph B. Hammer vs. The Arizona Copper Company, Limited, which case was likewise removed to this court by writ of error and was docketed at the October 1916 Term, No. 477, being the case last considered.

The question of primary importance in this case as in the Hammer case, is whether or not the Arizona Employers' Liability Law is constitutionally valid.

As this question is to be determined in the Hammer case, and that determination will necessarily rule in this case and as the questions involved from a constitutional standpoint have been argued in the Hammer case, to reiterate that argument in this case would be but unnecessary burdening of the record, and we therefore submit the validity of the act upon the argument in the Hammer case.

We will proceed, therefore, to consider briefly plaintiff in error's assigned errors other than those touching the validity of the law.

**Assignment I** is clearly without merit.



**Assignment II and III** present the constitutional validity of the Arizona law and as heretofore pointed out must necessarily be determined by the decision in the Hammer case.

Contributory negligence was not plead as reduction of damages, and, such being the case, is fully disposed of by the Arizona case, *Superior & Pitts. Cop. Co. v. Tomich*, 165 Pac. 1101.

#### **Assignment IV.**

Under this assignment, as under Assignment IV in the Hammer case, complaint is made of the overruling of plaintiff in error's special demurrer by which it was alleged that the injury was caused wholly by and resulted from the **usual** and **ordinary** risks of the employment.

In construing the Arizona law relative to assuming risks the Supreme Court of Arizona in the case of *Inspiration Consolidated Copper Company vs. Mendez*, 19 Ariz.———, 166, Pac. 278, said:

"The statute clearly does not require as a condition of liability that the accident causing the injury proximately resulted from the master's negligence, and it as clearly does exclude as a matter of defense the assumption of all ordinary and extraordinary risks inherent in the occupation. Such risks and dangers as are inherent in the occupation are declared to be unavoidable risks and dangers, and therefore it necessarily follows that the

employee in entering upon his duties does not assume such ordinary inherent risks, although known to him. Such risks as he may assume must be risks and dangers other than risks and dangers inherent in the occupation."

**Assignment V** is clearly without merit.

**Assignment VI** is also clearly without merit. If it was intended as an instruction to the effect that defendant in error could not recover if the injury was caused by his own negligence, then it was merely accumulative as the court so instructed the jury. (Transcript of Record, page 103.) If the instruction was asked on any other theory it was improper.

### **Assignment VII.**

This assignment also presents the common law doctrine of assumption of risk which did not arise in this action. This was fully discussed under Assignment IV.

### **Assignments VIII and IX.**

These assignments present questions of privileged communications which have been determined by this court adversely to the contention of plaintiff in error in the case of Arizona & New Mexico Railway Company vs. Clark, 235 U. S. 669, 59 L. ed.———35 Sup. Ct. Rep. 210, L. R. A. 1915 C.

A patient cannot be compelled to disclose communications which his physician is not permitted to disclose.

Verdelli v. Gray's Harbor Com. Co. 115  
Cal. 517.

If the patient testify to communication it is a waiver of the privilege and a consent that the physician testify.

Armstrong v. Topeka Ry. Co. 144 Pac.  
(Cal.) 850.

### **Assignment X.**

The question complained of by this assignment was clearly immaterial. Apart from what might constitute negligence previous practice in the mine could not in any way affect this action.

**Assignment XI** is without merit.

### **Assignment XII.**

The instruction complained of under this assignment was a limitation upon the liability of plaintiff in error and was given for its benefit; limiting the liability to all "such situations as could or might be foreseen or such as might in the ordinary course of events come about," and excluding "those extraordinary occurrences or situations which would not naturally be brought about even by the negligence of the employer, and which could not, by the exercise of the highest degree of prudence and foresight, have been foreseen." In other words, the court was but limiting the term, "condition or conditions of employment" for the benefit of plaintiff in error.

**Assignment XIII** is clearly without merit.

Evidence was introduced by defendant in error showing the exact manner in which the injury was brought about and the court instructed the jury that if the injuries were caused by the negligence of plaintiff himself then he could not recover. (Transcript of Record, Page 103.)

**Assignment XIV** does not present any question for the consideration of this court.

**Assignments XV and XVI** are wholly without merit.

#### **Interest on Judgment.**

Paragraph 3161, Civil Code of Arizona, 1913, provides that if the judgment of the lower court be sustained by the higher court, then there shall be added by the higher court interest at the rate of twelve (12) per cent. per annum on the amount of such judgment from the date of filing of the complaint in the lower court, which in this case was June 17, 1915. We request that such interest be added in case this judgment is affirmed.

Respectfully submitted,

L. KEARNEY,  
Clifton, Arizona,

FRANK E. CURLEY,  
Tucson, Arizona

Attorneys for Defendant in Error.

(26,286)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 819.

INSPIRATION CONSOLIDATED COPPER COMPANY, PLAINTIFF IN ERROR,

*vs.*

CEFERINO MENDEZ.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ARIZONA.

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In the Supreme Court of the State of Arizona.

Cause No. 1508.

INSPIRATION CONSOLIDATED COPPER COMPANY, a Corporation,  
Appellant,

VS.

CEFERINO MENDEZ, Appellee.

TRANSCRIPT OF RECORD.

Appearances:

For Appellant and Plaintiff in Error: Edward W. Rice.

For Appellee and Defendant in Error: A. C. McKillop, Geo. F. Senner.

In the Superior Court of Gila County, State of Arizona.

CEFERINO MENDEZ, Plaintiff,

VS.

INSPIRATION CONSOLIDATED COPPER COMPANY, a Corporation,  
Defendant.

*Complaint.*

Comes now Ceferino Mendez, the plaintiff in the above entitled cause, and complaining of the Inspiration Consolidated Copper Company, a corporation, the defendant in said cause, does allege:

1. That the plaintiff is a resident of Gila County, State of Arizona.
2. That the defendant is a corporation, organized under the laws of the State of Maine, duly incorporated and doing and transacting a mining business within Gila County, State of Arizona, and domiciliated therein.
3. That prior to and on the 28th day of July 1914, and at the time he received certain injuries hereinafter complained of, the said Ceferino Mendez was employed by and in the employment of the defendant; that the defendant is the owner of a mine in said Gila County; that in said mine on the said 28th day of July, 1914, the plaintiff was employed by the defendant; that on said day while in said employment while engaged in his work for the defendant while acting within the scope of said employment and while acting under the said contract of employment as such employee of the defendant, the plaintiff received certain injuries in said mine; that said injuries were received while the defendant was working underground at manual labor in hazardous employment of

a miner in defendant's said mine; that the circumstances of said injuries were as follows:

That on the 28th day of July, 1914, the plaintiff while engaged about his duties in the employment of the defendant, as hereinbefore set out, was on what is ordinarily termed the 300½ level in the defendant's said mine; that blasts were set off on said level, filling said level with gases; that fresh air was supplied to said level through a pipe; that after said blasts it was necessary to turn on fresh air by means of opening a valve in said fresh air pipe; that plaintiff opened said valve for said purpose and when the plaintiff did so some foreign particles were blown into his eyes by the force of said air which has completely destroyed one eye and the sight thereof; that the sight of the other eye is endangered and is

3       impaired; that to turn on said air was a part of the defendant's duties; that since said accident that plaintiff has been unable to work at all; that at the time of said accident plaintiff was receiving Two Dollars and 75/100 a day for his work; that the age of the plaintiff is thirty-two years; that the sight of one eye has been totally destroyed; that the other eye will be permanently impaired; that the plaintiff has suffered great pain from the effects of said accident.

4. That said accident was due to a condition or conditions of plaintiff's said occupation while an employee in the service of the defendant; that said employment was a hazardous occupation; that said injury was not caused in whole or in part by the negligence of the plaintiff; that this action is brought under the Employers' Liability Law, Chapter 6, Title 14, Revised Statutes of Arizona of 1913.

5. That by reason of said injuries, the plaintiff has suffered damages in the sum of Three Hundred Fifty One Dollars and 80/100, arising from his inability to labor and earn wages from the said 28th day of July, 1914, to the institution of this suit; that the plaintiff has suffered great damages from said injuries due to

4       the permanent injury to his eyes and has also suffered great damages from said injuries due to the pain and suffering occasioned by said injury, all in the sum of Eight Thousand Dollars.

Wherefore, the plaintiff asks judgment against the defendant in the sum of Eight Thousand, Three Hundred Fifty One Dollars and 80/100 and for his costs in this cause incurred.

GEORGE F. SENNER,

A. C. McKILLOP,

*Attorneys for Plaintiff.*

Endorsement: Filed at 2:30 P. M., Nov. 9, 1914. J. W. Wentworth, Clerk.

(Title of Court and Cause.)

*Answer.*

Inspiration Consolidated Copper Company, a corporation, the defendant in the above entitled cause, answers the complaint of plaintiff herein as follows:



5 The defendant demurs to said complaint upon the ground that the same does not state facts sufficient to constitute a cause of action.

Said complaint fails to state facts sufficient to constitute a cause of action for the reason that there is no allegation in said complaint either of fact or conclusion, showing that the injury of the plaintiff complained of was caused in whole or in part, or was contributed to, by any negligence on the part of this defendant, or that this defendant was negligent in any respect whatsoever. Said action is brought under Chapter VI of Title 4 of the Revised Statutes of Arizona, 1913, being the Employers' Liability Law, and that said law imposes a liability without fault and is invalid because in conflict with Section 4 of Article II of the Constitution of the State of Arizona, and Article V and Section 1 of Article XIV of the Amendments to the Constitution of the United States.

Wherefore this defendant prays that the plaintiff take nothing by his action and that the defendant have judgment for its costs.

EDWARD W. RICE,  
*Attorney for Defendant.*

Endorsement: Filed at 2:30 P. M., Dec. 7, 1914. J. W. Wentworth, Clerk, by Elsie Patton, Deputy.

6 (Title of Court and Cause.)

*First Amended Complaint.*

Comes now Ceferino Mendez, the plaintiff in the above entitled cause, and complaining of the Inspiration Consolidated Copper Company, a corporation, the defendant in said cause, does  
7 allege:

1. That the plaintiff is a resident of Gila County, State of Arizona.

2. That the defendant is a corporation, organized under the laws of the State of Maine, duly incorporated and doing and transacting a mining business within Gila County, State of Arizona, and domiciliated therein.

3. That prior to and on the 28th day of June, 1914, and at the time he received certain injuries hereinafter complained of, the said Ceferino Mendez was employed by and in the employment of the defendant; that the defendant is the owner of a mine in said Gila County; that in said mine on the said 28th day of June, 1914, the plaintiff was employed by the defendant; that on said day while in said employment while engaged in his work for the defendant while acting within the scope of said employment and while acting under the said contract of employment as such employee of the defendant, the plaintiff received certain injuries in said mine; that said injuries were received while the defendant was working underground at manual labor in the hazardous employment of a miner in defendant's said mine; that the circumstances of said injuries were as follows:

That on the 28th day of June, 1914, the plaintiff while engaged

8 about his duties in the employment of the defendant, as hereinbefore set out, was on what is ordinarily termed the 300 1-2 level in the defendant's said mine; that blasts were set off on said level, filling said level with gases; that fresh air was supplied to said level through a pipe; that after said blasts it was necessary to turn on fresh air by means of opening a valve in said fresh air pipe; that plaintiff opened said valve for said purpose and when the plaintiff did so some foreign particles were blown into his eyes by the force of said air which has completely destroyed one eye and the sight thereof; that the sight of the other eye is endangered and is impaired; that to turn on said air was a part of the defendant's duties; that since said accident the plaintiff has been unable to work at all; that at the time of said accident, plaintiff was receiving Three Dollars and 75-100 a day for his work; that the age of the plaintiff is thirty-two years; that the sight of one eye has been totally destroyed; that the other eye will be permanently impaired; that the plaintiff has suffered great pain from the effects of said accident.

4. That said accident was due to a condition or conditions of plaintiff's said occupation while an employee in the service of the defendant; that said employment was a hazardous occupation; that said injury was not caused in whole or in part by the negligence of the plaintiff; that this action is brought under the Employers' Liability Law, Chapter 6, Title 14, Revised Statutes of Arizona of 1913.

9 5. That by reason of said injuries, the plaintiff has suffered damages in the sum of Three Hundred Fifty One and 80-100 Dollars, arising from his inability to labor and earn wages from the said 28th day of June, 1914, to the institution of this suit; that the plaintiff has suffered great damages from said injuries due to the permanent injury to his eyes and has also suffered great damage from said injuries due to the pain and suffering occasioned by said injury, all in the sum of Eight Thousand Dollars.

Wherefore, the plaintiff asks judgment against the defendant in the sum of Eight Thousand, Three Hundred Fifty One and 80-100 Dollars and for his costs in this cause incurred.

A. C. McKILLOP.

GEO. F. SENNER.

Endorsed: "Filed March 20, 1915," at 3:35 P. M. J. W. Wentworth, Clerk, by Elsie Patton, Deputy.

(Title of Cause.)

*Answer to Amended Complaint.*

Comes now Inspiration Consolidated Copper Company, a corporation, the defendant in the above entitled action and files this its answer to the amended complaint of plaintiff herein.

10

## I.

Defendant denies each and every, all and singular, the matters, allegations, and things in said amended complaint contained.

## II.

For a further, separate, and independent defense defendant alleges that there is no allegation in said amended complaint which shows, or tends to show, that this defendant was negligent in any respect, or that the alleged injuries of plaintiff were caused by or due to any negligence or other wrongful act of this defendant; that the complaint herein is based upon, and said action is brought under Chapter VI of Title 14 of the Revised Statutes of Arizona of 1913, commonly known as and called the Employer's Liability Law; that said law is void and of no effect, for the reason that the same attempts to create a liability without fault; that said statute violates Section 4 of Article 2 of the Constitution of the State of Arizona, and Section 1 of Article 14 of the Amendments to the Constitution of the United States, in that, said Act, if enforced, would deprive this defendant of its property without due process of law and would deny to this defendant the equal protection of the laws; that for the reasons aforesaid the complaint herein does not state facts sufficient to constitute a cause of action.

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## III.

As a further, separate, and independent defense defendant alleges that if the plaintiff received the alleged, or any, injuries, as set forth in said complaint, or otherwise, or at all, said injuries were caused solely by the negligence and want of care of said plaintiff; that said plaintiff in opening the valve referred to in paragraph III of the complaint herein did not use ordinary, or any, care of his own safety, but so carelessly and negligently opened said valve as to cause the alleged injury to plaintiff's said eyes.

## IV.

For a further, separate, and independent defense defendant alleges that if the plaintiff received the alleged, or any, injuries to his said eyes, as set forth in the complaint, or otherwise, or at all, said plaintiff did not for a long period of time immediately following said alleged accident and injury, use ordinary, or any, care in the treatment of said injuries; that said injuries, if any, were, when received, trivial, and the same could and would have been entirely cured by prompt and proper treatment; that plaintiff did not for a long period of time, to-wit, a period of more than three days, seek or secure medical, or any, attention for said alleged injuries; that by reason of the negligence and carelessness of plaintiff in not caring for said injuries and in not obtaining promptly proper, or any, medical attention for said alleged injuries,

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and as a direct result of his said negligence and delay, said injuries were aggravated and said eye became infected and was lost, if it was lost.

### V.

For a further, separate, and independent defense the defendant alleges that the valve referred to in paragraph 3 of said complaint was a valve of the usual and ordinary type used in mining; that it was a simple appliance; that the plaintiff was entirely familiar with said valve and such type of valve, and with the operation thereof; that if plaintiff opened said valve as alleged in paragraph 3 of the complaint and foreign particles were thereupon blown into his eyes by the air escaping through said valve and thereby caused the alleged, or any, injury to plaintiff, such injuries were the result and were caused by the usual and ordinary risks and dangers of the work; that the risk and danger of injury therefrom were open and obvious, were apparent to and were fully observed, understood, and appreciated by the plaintiff, and that plaintiff assumed the risk of injury therefrom.

13

### VI.

For a further, separate, and independent defense defendant alleges that the work which plaintiff alleges was being done by him at the time of said alleged injury was manual and mechanical labor in the mine of defendant; that said work was, and is within the purview of Chapter VII of Title 14 of the Revised Statutes of Arizona of 1913, commonly known as the Workmen's Compensation Act; that the plaintiff and defendant did not before the day of the alleged accident, or at any time, disaffirm an employment under the provisions of said Act by written contract; that neither the plaintiff nor the defendant before the day of said alleged accident, or at any time, by written notice from either to and served upon the other, or otherwise, disaffirmed an employment under the provisions of said Act; that on the day of said alleged accident, and at the time said alleged injuries were received, said Act was in full force and effect and governed and controlled the employment of plaintiff; that after said alleged accident and injury the plaintiff gave the defendant due notice thereof; that thereafter plaintiff demanded of defendant, and defendant paid to plaintiff, at various times, as provided in said Act, sums of money aggregating Two Hundred Sixty-two and 47-100 (262.47) Dollars; that said sums were equal to one-half of the wages which said plaintiff would have

14 earned during the period during which he was unemployed by reason of said alleged accident and injury, as provided in said Act; that said sums were demanded by plaintiff, were paid by defendant, and were accepted by plaintiff as payments under and in accordance with said Act; that by reason of the facts aforesaid the plaintiff has elected to abide by said Compensation Act and to settle any claim which he may have against this defendant by rea-

son of said accident and injuries under and in accordance with said Act; that this defendant has never refused to make any payment under said Act but that said plaintiff after receiving said sums of money as aforesaid refuses, and does now refuse, to accept further payments under said Act.

Wherefore this defendant prays that the plaintiff take nothing by his action, that the same be dismissed, and that defendant have judgment for its costs.

EDWARD W. RICE,  
*Attorney for Defendant.*

Endorsed: "Filed March 23, 1915," at 9:50 A. M. J. W. Wentworth, Clerk, by Elsie Patton, Deputy.

15 Received a copy of the within answer this 23rd day of March, 1915.

A. C. McKILLOP,  
GEO. F. SENNER,  
*Attorneys for Plaintiff.*

(Title of Court and Cause.)

*Minute Entries.*

Be it remembered that heretofore and to-wit: On the 14th day of December, 1914, the same being one of the regular juridical days of said Court, the following order was made and entered, in said court, in said cause, which order is in figures and words, as follows, to-wit:

*Order Continuing Hearing.*

CEFERINO MENDEZ

vs.

INSPIRATION CONSOLIDATED COPPER COMPANY.

It is ordered that the hearing of the demurr- to the complaint herein be continued subject to call.

Be it remembered that heretofore and to-wit: On the 16th day of February, 1915, the same being one of the regular juridical days of said Court, the following order was made and entered, in said Court, in said cause, which order is in figures and words as follows, to-wit:

16-35

*Order Overruling Demurrer.*

CEFERINO MENDEZ

VS.

INSPIRATION CONSOLIDATED COPPER COMPANY.

It is by the Court ordered that the demurrer herein be overruled.

\* \* \* \* \*

36 Mr. Rice: If the Court please, I object to that. And I  
 object to the introduction of any further testimony in this  
 case for the reason that the complaint does not state facts sufficient  
 to constitute a cause of action. And the reason of that is this is an  
 action under the liability law which seeks to impose a liability with-  
 out fault, and that law is unconstitutional, invalid and violates the  
 XIV amendment to the United States Constitution for the  
 37-270 reason that it seeks to impose a liability without fault.  
 The law in question being Chapter VI, Title XIV, R. S.  
 1913.

The Court: The objection is overruled.

Mr. Rice: I would like the record to show we take an exception.

\* \* \* \* \*

271

(Title of Court and Cause.)

*Instructions Requested by Defendant.*

1. This action is brought under an Arizona statute commonly known as the Employer's Liability Law. This law makes the employer liable in damages for injuries to the employee where the employee is injured while working in the mines or in other employments designated in the law and declared to be especially dangerous and hazardous, where such injury is due to a condition or conditions of the occupation or employment and is not caused by the negligence of the employee injured. Except read in No. 9 herein.

You are instructed that the words "due to a condition or conditions" of the occupation of employment as used in this law, have reference solely to the risks and hazards which are inherent in such occupations because of their actual or supposed hazardous character, and that they do not include conditions which result from the failure of the employer to prescribe safe methods of doing the work or to furnish proper tools or appliances with which to do it.

272 In short, you are instructed that this law does not give a  
 cause of action for negligence of the employer, and that an  
 injury caused by the neglect of the employer cannot be due

to a condition or conditions of the occupation or employment within the meaning of said law.

Given as framed.

G. W. SHUTE, *Judge*.

2. If you find that the injury to the plaintiff, Mendez, was solely caused by neglect on the part of the defendant, your verdict must be for the defendant.

Given as modified.

G. W. SHUTE, *Judge*.

3. Unless you find that the injuries to Mendez were due to a condition or conditions of his work, as these words are defined in a prior instruction, your verdict must be for the defendant.

Given.

G. W. SHUTE, *Judge*.

4. If you find that the valve which Mendez opened when he was injured was unusually stiff and that the injury was caused by the condition of the valve, your verdict must be for the defendant.

Refused.

G. W. SHUTE, *Judge*.

5. If you find that Mendez could, in the exercise of reasonable care for his own safety, have opened the valve without placing his eyes in such position as to receive the force of the air in his face, without so delaying his leaving the drift as to incur danger from the blasts, your verdict must be for the defendant.

Refused.

G. W. SHUTE, *Judge*.

6. You are instructed that it was the duty of Mendez in opening the valve to use ordinary care for his own safety, and if you find that he did not use ordinary care in opening said valve to protect his eyes from the air and dust or dirt, and that his lack of such care wholly caused his injury, then your verdict must be for the defendant.

Given as modified.

7. You are instructed that an employee assumes the risk of injury from the usual and ordinary dangers of his work. If you find that Mendez received his injury as a result of the usual and ordinary dangers of his work, that the danger of injury therefrom was open and obvious to him, and that he knew, understood, and appreciated the danger of injury therefrom, then under the law he assumed the risk of injury and your verdict must be for the defendant.

Refused.

G. W. SHUTE, *Judge*.

\* \* \* \* \*



273b-77 You are instructed to return a verdict in favor of the defendant.

Refused.

G. W. SHUTE, *Judge*.

You are instructed that the burden of proof is upon the plaintiff in this action and that unless the plaintiff has proven his cause of action by a preponderance of evidence, your verdict must be for the defendant.

Given.

G. W. SHUTE, *Judge*.

\* \* \* \* \*

278-80 If you find that the injury to the plaintiff, Mendez, was solely caused by neglect on the part of the defendant, your verdict must be for the defendant.

\* \* \* \* \*

281

(Title of Court and Cause.)

*Verdict.*

We, the Jury duly empaneled and sworn in the above entitled action, upon our oaths do find for the Plaintiff in the sum of Five thousand five hundred (\$5,500.00) Dollars, Less Amt. paid to Plaintiff.

T. P. HOWARD, *Foreman*.

(Title of Court and Cause.)

*Judgment.*

This cause coming on regularly to be heard, the plaintiff appearing by his counsel, Geo. F. Senner, Esq., and A. C. McKillop, and the defendant appearing by its counsel, Edward W. Rice, Esq., and a jury of twelve persons having been regularly impaneled  
282 and sworn; and the trial of said cause having been begun on the 23rd day of March, 1915, and having ended on the 25th day of March, 1915; and evidence having been introduced in behalf of the plaintiff and in behalf of the defendant; and all issues of fact having been submitted to the jury; and the jury having heard the evidence, the arguments of counsel, and instructions of the court, and having duly returned a verdict in favor of the plaintiff in the sum of Fifty Five Hundred (\$5,500.00) Dollars less the amount previously paid the plaintiff by the defendant, the amount of which payment was not in issue but was agreed upon by both the plaintiff and the defendant and amounted to the sum of Two Hundred Sixty Two and 47-100 (\$262.47) Dollars.



Now, therefore, it is ordered, adjudged, and decreed, That the plaintiff, Ceferino Mendez, do have and recover of the Inspiration Consolidated Copper Company, a corporation, defendant, the sum of Five Thousand, Two Hundred Thirty Seven and 53-100 (\$5,237.53) Dollars, together with his costs in this cause incurred amounting to the sum of Thirty Six and 90-100 (\$36.90) Dollars, together with interest on Five Thousand, Two Hundred Seventy Four and 43-100 (\$5,274.43) Dollars, at the rate of six per cent from the date of this judgment until paid.

Given under my hand this 29th day of March, 1915.

G. W. SHUTE,  
*Judge of the Superior Court.*

Filed April 12, 1915.

Approved as to form.

EDWARD W. RICE,  
*Atty. for Dft.*

(Title of Cause.)

*Motion for New Trial.*

Comes now Inspiration Consolidated Copper Company, a corporation, defendant in the above entitled action, and moves the court for an order vacating the judgment heretofore entered in said action and granting a new trial. This motion is based upon the following causes materially affecting the rights of this defendant:

1. Errors of law occurring at the trial of the cause.
2. Errors of law occurring during the progress of the cause.
3. That the verdict is not justified by the evidence.
4. That the verdict is contrary to law.
- 284-6 5. That the judgment is not justified by the evidence.
6. That the judgment is contrary to law.
7. That the court erred in admitting evidence offered by the plaintiff.
8. That the court erred in rejecting evidence offered by the defendant.
9. That the court erred in charging the jury.
10. That the court erred in refusing instructions asked by the defendant.

Dated at Globe, Arizona, this 6th day of April, 1915.

EDWARD W. RICE,  
*Attorney for said Defendant.*

Filed April 7, 1915.

\* \* \* \* \*

287

(Title of Cause.)

*Notice of Appeal.*

Notice is hereby given that the above named defendant, Inspiration Consolidated Copper Company, a corporation, appeals to the Supreme Court of the State of Arizona from the judgment rendered in said court in the above entitled cause on the 29th day of March, 1915, in favor of the above named plaintiff, Ceferino Mendez, and against the said Inspiration Consolidated Copper Company, a corporation, and from the whole thereof.

Dated this 27th day of September, 1915.

EDWARD W. RICE,  
*Attorney for Defendant.*

Filed September 27, 1915.

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*Assignment of Errors.*

1. The court erred in overruling defendant's demurrer to the complaint (abstract of record, folio 252) for the reason that the complaint fails to allege any negligence on the part of the defendant and is based solely on the Employer's Liability Law, which law attempts to impose a liability without fault and violates the Fourteenth Amendment to the Constitution of the United States in that it deprives the defendant of its property without due process of law and of the equal protection of the law. Said complaint, therefore, fails to state facts sufficient to constitute a cause of action.

2. The court erred in overruling defendant's objection to the introduction of any testimony in this cause (abstract of record, folio 36), which objection was based upon the ground that the complaint does not state a cause of action for the reason that the Liability Law under which the suit was brought was invalid and in violation of the Fourteenth Amendment to the United States Constitution.

3. The court erred in refusing to give the following instruction requested by defendant: "You are instructed to return a verdict in favor of the defendant." (Abstract, folio 209.) The requested instruction should have been given for two reasons: The Liability Law under which the suit was brought is void because in violation of the Fourteenth Amendment to the Constitution of the United States and hence the complaint did not state facts sufficient to constitute a cause of action, and plaintiff could not make out a case thereunder; and the evidence showed that plaintiff collected half-time under the Compensation Act, so that the latter Act furnished the sole measure of the rights and liabilities of the parties.

4. The court erred in refusing to give the following instruction requested by the defendant:

"You are instructed that an employee assumes the risk of injury from the usual and ordinary dangers of his work. If you find that Mendez received his injury as a result of the usual and ordi-

290 nary dangers of his work, and that the injury therefrom was open and obvious to him and that he knew, understood, and appreciated the danger of injury therefrom, then under the law he assumed the risk and your verdict must be for the defendant." (Abstract, folio 209.)

The foregoing instruction is correct in law and is applicable to the facts shown in evidence. Assumption of risk is a proper defense in actions under the Liability Law (Par. 3166 Revised Statutes of 1913) and must in all cases be left to the jury. (Par. 3166 Revised Statutes of 1913; Arizona Const., Sec. 5, Art. 18.)

5. The court erred in sustaining the plaintiff's objection to the question put to Dr. John E. Bacon (folios 204, 205) as to the condition of the eyes of the plaintiff when the latter entered the hospital on July 1, 1914. This testimony was material in that Doctor Bacon was the only witness before the court who could state of his own knowledge, from personal observation, the condition of plaintiff's eyes at that time. Other testimony had been given on behalf of plaintiff bearing upon that question. The right of plaintiff to

291 object to this testimony as privileged, if he possessed such privilege, was waived by his bringing suit, taking the stand and testifying fully and freely with reference to the injury and the subsequent condition of his eye, and by his testifying voluntarily as to his going to the hospital and his treatment there by the hospital staff and by Doctor Bacon personally, who was the head of that staff.

6. The court erred in denying defendant's motion for a new trial (folio 285) for the reasons specified in the foregoing assignments of error and for the following additional reasons: that the verdict and judgment are not supported by the evidence; and that the verdict is excessive. The evidence shows that plaintiff wholly caused his initial injury by his own negligence and want of ordinary care in opening the valve. It shows that his long delay in securing treatment for his injury seriously infected and aggravated the injury and caused the serious consequences of which he now complains. It shows that the plaintiff collected money under the Compensation Act and hence he cannot recover under the Liability Law. It also shows that the verdict is excessive.

292 Be it remembered that heretofor and to-wit on the 2nd day of July, 1917, the same being one of the regular juridical days of the Supreme Court of the State of Arizona, the following order and judgment was made and entered in said cause which is in figures and words as follows to-wit:

At this day it is ordered That the judgment of the lower court made and entered in this cause be and the same is hereby affirmed; Judge Ross dissenting.

It is further ordered, adjudged and decreed, That Ceferino Mendez, appellee herein, do have and recover of and from the Inspiration Consolidated Copper Company, a corporation, appellant herein, as principal, and United States Fidelity and Guaranty Company, a corporation, surety on supersedeas bond herein, the principal sum

of Five Thousand Two Hundred Thirty Seven and 53/100 (\$5,237.53) Dollars, together with his costs in the lower court in this cause incurred taxed at Thirty Six and 91/100 (\$36.91) 293 Dollars, with interest on all of said sums at the rate of six per cent per annum from the 29th day of March, 1915 until paid, together with his costs in this court in this cause incurred.

294 In the Supreme Court of the State of Arizona.

No. 1508.

INSPIRATION CONSOLIDATED COPPER COMPANY, a Corporation,  
Appellant,

vs.

CEFERINO MENDEZ, Appellee.

*Opinion.*

Appeal from a Judgment of the Superior Court of Gila County.  
G. W. Shute, Judge; Affirmed.

The appellee commenced this action to recover damages for alleged injuries received by him on June 28th 1914 while occupied in the performance of his underground duties in the course of his employment by the appellant in appellant's mines. The injury suffered was inflicted at the time he opened a valve to admit compressed fresh air into a compartment of the mine to the end that the working be cleared of foul air, permitting the workmen there to proceed with their mining. When the said valve was opened by the appellee, the air escaping therefrom under heavy pressure struck appellee's face and cast dirt or other substances into his eyes causing 295 injuries thereto. Negligence is not asserted as a cause of the injuries, but plaintiff alleges that said accident was due to a condition or conditions of plaintiff's said occupation while an employee in the service of the defendant; that said employment was a hazardous occupation; that said injury was not caused in whole or in part by the negligence of the plaintiff; and, that this action is brought under the Employer's Liability Law, Chapter VI, Title 14, Revised Statutes of Arizona, Civil Code, 1913.

The defendant in defense to the action asserts that Chapter VI, Title 14 of the Civil Code of Arizona, 1913, upon which the action is based, is void for the reason that the same attempts to create a liability without fault and therefore would deprive this defendant as an employer of its property without due process of law, and would deny the equal protection of the laws, in violation of Section 4 Article VIII of the State Constitution, and of Section 1 of the Fourteenth Amendment to the Constitution of the United States; and for these reasons the complaint fails to state facts sufficient to constitute a cause of action.

296 The further defenses of negligence by the plaintiff as the sole cause of the injury; the contributory negligence of the plaintiff in that he failed to timely and properly treat the injuries inflicted upon his eyes, which delay enhanced the damages thereto; the assumption of the risk by plaintiff, the defendant asserting that the injury resulted from an obvious and ordinary risk of the occupation; and, the defendant alleging that the plaintiff's remedy and defendant's liability if any are fixed by Chapter VII of Title 14, the Compensation Law, and not fixed by Chapter VI of Title 14 upon which the action is based.

The court disallowed all of defendant's objections to proceeding under the Employers' Liability Law, Chapter VI, Title 14, based on constitutional ground, and a trial of the cause resulted in a verdict for plaintiff in the sum of \$5,500.00 less the amount, \$262.47, concededly paid to plaintiff by the defendant. The court deducted

said \$262.47, the said amount paid to plaintiff from the said  
297 amount found as damages, without objection, and rendered judgment for plaintiff for the sum of \$5,237.53 and costs. From such judgment and from an order refusing a new trial, defendant appeals.

Mr. Edward W. Rice, of Globe, for Appellant.

Mr. A. C. McKillop, of Globe, and Mr. Geo. F. Senner, of Miami, for Appellee.

CUNNINGHAM, J.:

The appellee moves the dismissal of this appeal upon the ground that the appellant failed to take an appeal before filing an appeal bond.

The judgment in this case was ordered entered on the 29th day of March, 1915. The motion for a new trial was denied April 12, 1915. The appeal bond including a provision for superseding the execution of the judgment was filed on August 30th 1915. On September 27th 1915, the appellant gave its notice of appeal from the said order refusing a new trial and from said judgment. The appellee contends that because the bond was filed before the notice of appeal was given that at the time the bond was filed no appeal had been taken and that the bond was therefore prematurely filed and such filing of the bond does not serve any purpose of appeal.

An appeal may be taken from a final judgment of the  
298 superior court in a civil action, at any time within six months after the rendition of the judgment; Paragraph 1233, Civil Code of Arizona, 1913. The appeal is taken by giving a notice of appeal, either in open court or in writing substantially in the form prescribed by Paragraph 1235, Civil Code, 1913, and the appeal is perfected when the notice of appeal has been given and the appeal bond, or affidavit in lieu thereof, has been filed within the time in which the appeal may be taken, that is within six months after the rendition of the final judgment. Paragraph 1236, Civil Code, 1913.

The appeal is perfected on the date when both the notice of appeal has been given and the appeal bond, or affidavit in lieu thereof, has been filed, or the date upon which the notice of appeal is given in cases in which no appeal bond is required. Paragraph 1237, Civil Code, 1913.

The performance of both of these acts within six months after the rendition of the judgment serves to effect a removal of the cause from the superior courts to the Supreme Court. The matter of the removal of the cause from the lower to the higher court for review is the important purpose of the appeal. The order in which these necessary acts are to be performed so that the cause is effectually removed from the lower court to the higher, and by which the lower court is divested of jurisdiction over the cause, and the appellate court acquires jurisdiction over the cause, is not made important by the statute. The statute leaves the matter of the order of performing each of these necessary acts of removal to the pleasure of the party desiring to appeal, and only limits the time within which he must perform both acts necessary to the accomplishment of the appeal to the period of six months from the date of the rendition of the judgment. *Wores v. Preston*, 4 Ariz. 92, 77 Pac. 617, I think correctly decided the identical question here presented twenty four years ago, and that decision has remained the law to this day.

The appellee contends that the giving of the notice is the essential act of taking an appeal, and that the filing of a bond at a time prior to the time of giving of the notice of appeal is not equivalent in law to the filing of such bond after the appeal is taken, and that the appeal must be first taken and thereafter the bond must be filed in order to effect an appeal. It is quite clear from the statutes that the giving of the notice of appeal is an act essential to taking an appeal. It is also quite clear from the statutes that the furnishing of an appeal bond, or affidavit in lieu of such bond, as the case may be, is essential to perfecting an appeal. The purpose of the statute requiring an appeal bond to be given is to protect the rights of the appellee pending the appeal. The parties may by written stipulation waive the giving of an appeal bond, and such waiver of the bond does not affect the appeal. Paragraph 1235, Civil Code, 1913.

The appellee had the right to object to the appeal bond on the grounds of its insufficiency for the reasons of any error, defect or insufficiency at any time within ten days after the filing of such bond, by giving notice of the errors, defects and insufficiencies in such bond of which he complains, and failing to give such notice all errors and defects or insufficiencies in any appeal bond are deemed waived. Paragraph 1253, Civil Code, 1913.

Hence, the time of filing the appeal bond is important as fixing the time within which the appellee may object to errors, defects and insufficiencies therein.

Until the notice of appeal is given, the appellee's rights in the judgment are unaffected even though an appeal bond has been deposited by the appellant with the files in the cause. If appellee has knowledge that such bond has been deposited with the papers of the



cause, he is not required to object to the sufficiency of such bond until he is notified as required by law that the adverse party has taken an appeal. When the notice of appeal is given and the appeal bond is present in the cause, the adverse party then may object to the sufficiency of the appeal bond within the time provided, else he waives defects and the appeal is perfected and the jurisdiction over the cause is transferred. The presence of the appeal bond in the

302 files of the court at the time the notice of the appeal is given, is a sufficient filing of the appeal bond to require the adverse party, the appellee, to examine it for errors, defects and insufficiencies, and if any are found to then raise objections thereto. If no objections on the ground of defects, errors or insufficiencies are raised by the appellee within ten days thereafter, the bond is deemed effective as an appeal bond to accomplish a removal of the cause from the lower to the higher court. The obligors on the bond may not be heard to question their liability, and the appellee is furnished the protection pending appeal which the statutes are intended to give to him.

The appellee contends that in this case the bond filed is in form a supersedeas bond, and if an adverse party be permitted to file such a bond and thereby suspend the execution of a judgment before the appellee has notice of the taking of an appeal, the appellee suffers a wrong. This is assuming that a supersedeas bond filed before an appeal is taken has the effect of suspending a judgment from the time of the filing of the bond. Such is not the effect of the  
303 depositing of such bond in the cause. The execution of the judgment may not be suspended by giving a supersedeas bond until an appeal is taken from the judgment. Paragraph 1243, Civil Code, 1913. In this case, however, on April 5th, 1915, the court ordered a stay of execution for sixty days, and on the first day of June, 1915, the court ordered the execution further stayed until the first day of September, 1915. The execution of the judgment in this cause was not suspended by the filing of the supersedeas bond on August 30th, 1915, from that date until September 27th 1915, when the notice of appeal was given, but the execution was stayed by the order of the court as a fact until September 1st, 1915. Whether the judgment was open to execution from September 1st to September 27th, 1915, is a matter not presented nor urged on this record. Certainly the fact that a bond in form was deposited with the papers in the cause purported to suspend the execution of the judgment did  
304 not have that effect until the appeal was taken. The mere fact that the appeal bond was deposited with the papers in the cause at a time after the motion for a new trial has been denied, and prior to the time of giving notice of appeal, is no grounds for dismissing the appeal,—the bond and notice having been placed in the lower court within the time required for taking an appeal certainly perfected the appeal. The motion is therefore denied.

The principal question presented in this record and contest on this appeal is whether the Employers' Liability Law, Chapter VI, Title 14, Civil Code of Arizona, 1913, is constitutionally valid. The appellant

first challenged the validity of the statute by a general demurrer, which was overruled. It objected to the introduction of any testimony upon the same grounds. At the close of the evidence it requested a directed verdict in its favor, and in its motion for a new trial the same grounds were urged. The appellant states in its opening argument that:

"The first three assignments of error involve the single overshadowing question of the invalidity of the Liability Law and will be considered together."

305 The appellant contends, and I think his contention is correct, that the liability statute must be construed as one creating a liability for accidents resulting in injuries to the workmen engaged in hazardous occupations due to the risks and hazards inherent in such occupations, without regard to the negligence of the employer as such negligence is understood in the common-law of liability,—in other words: such statute creates a liability for accident arising from the risks and hazards inherent in the occupation without regard to the negligence or fault of the employer. The cause was tried upon that theory, and the judgment must stand or fall according to the validity or invalidity of the said statute. The appellant makes the broad statement that "a statute creating such a liability cannot stand." At the threshold of the discussion we encounter the inquiry of the power of the legislature to enact liability laws which in effect modify the common-law of liability based upon negligence or fault,—liability because of a failure on the part of the employer to perform a duty owing to the employee.

Chapter VI of Title 14, was enacted as a response to the mandate contained in Section 7 of Article XVIII of the State Constitution, reading as follows:

"To protect the safety of employees in all hazardous occupations, in mining, smelting, manufacturing, railroad or street railway transportation, or any other industry the Legislature shall enact an Employer's Liability law, by the terms of which any employer, whether individual, association, or corporation shall be liable for the death or injury, caused by any accident due to a condition or conditions of such occupation, of any employee in the service of such employer in such hazardous occupation, in all cases in which such death or injury of such employee shall not have been caused by the negligence of the employee killed or injured."

This provision is clearly one mandatory upon the legislative branch of the State Government as to all the requirements set forth in that provision for affirmative action by the legislature. The framers of the Constitution, and the people adopting the Constitution, by this section clearly set forth and made known to the legislative department,—the legislative branch of the State Government, that the public policy of this State and of the people of the

307 State is that employers of labor in hazardous occupations of all kinds of such industries shall be liable in damages to such employee as shall be injured when the injury is caused by any accident due to a condition or conditions of such occupations without re-



gard to negligence of the employer as the cause. The only limitation or restriction thrown about the legislature's duty in this respect is that in the enactment of employer's liability laws or other laws of such nature, no employer shall be made liable for the death or injury of any employee, when such death or injury shall have been caused by the negligence of the employee killed or injured.

The form of our State government furnishes no means by which the legislature may be coerced into obeying such mandate so made its duty. The courts have no such power. This is certainly true.

Adams v. Howe, 14 Mass. 340, 7 Am. Dec. 216, 220:

Holbrook v. Holbrook, 1 Pick. 248:

308 In re opinion, 68 Me. 582:

School Board v. Patten et al., 62 Mo. 444:

Ex parte Alabama, 52 Ala. 231, 23 Am. Rep. 567, 573:

Sawyer v. Gilmore, 109 Me. 169, 83 Atl. 673:

In re State Census, 6 S. D. 540, 62 N. W. 129.

From these authorities and others that may be cited, and from the very nature of the matter, the legislative power of the State is not controlled nor controllable by simple mandatory directions given by means of constitutional provisions which direct action but do not restrict action on the part of the legislature. When the legislature is not constitutionally restricted, it may act or not as the occasion may seem proper, and in acting may pass any law the legislature deems for the welfare of the State unless prohibited by some positive constitutional provision, and all such laws not so prohibited are valid.

The provisions of the Constitution are all deemed mandatory, but that does not mean that the judicial branch of the State government has been confided with the power to enforce all mandatory provisions contained in the Constitution directed to the legislative and

309 executive branches of the State government of co-ordinate powers with the judicial branch. These matters are elementary and evident. So the constitutional mandate, supra, in no manner controls the legislature in the adoption by it of any provision of the Employer's Liability Law, unless it attempts to place liability upon an employer for the death or injury of an employee killed or injured by such employee's own negligence.

Appellant contends that the statute in question is in conflict with Section 1 of the Fourteenth Amendment to the United States Constitution prohibiting laws which deprive any person of property without due process of law, and that deny persons the equal protection of the laws, for the reason Chapter VI, Title 14, declares that an employer is liable for personal injuries suffered by an employee in the absence of any fault on the employer's part in causing such injury.

In Paragraph 3147 of Chapter VI of Title 14, Civil Code of Arizona, 1913, it is declared in no uncertain language that:

"Employment in all underground mines, underground workings, open cut workings, open put workings, in or about, and in connection with, the operation of smelters, reduction works, stamp mills, concentration mills, chlorination processes, cyanide processes, cement works, rolling mills, rod mills, and at coke ovens and

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blast furnaces, is hereby declared to be injurious to health and dangerous to life and limb."

Hence, laws enacted which reasonably regulate such employments are regulations within the police powers of the State.

Again, Paragraph 3156 of Chapter VI, Title 14, Civil Code of Arizona, 1913, places certain enumerated occupations within the police powers of regulation by the State, thus:

"3156. The occupations hereby declared and determined to be hazardous within the meaning of this chapter are as follows: \* \* \*

(2.) All work when making, using or necessitating dangerous proximity to gunpowder, blasting powder, dynamite, compressed air, or any other explosive. \* \* \*

(8.) All work in or about quarries, open pits, open cuts, mines, ore reduction works and smelters."

Paragraph 3155, id., contains the following declaration of public policy, to wit:

"By reason of the nature and conditions of, and the means used and provided for doing the work in, said occupations, such service is especially dangerous and hazardous to the workmen therein, because of risks and hazards which are inherent in such occupations and which are unavoidable by the workmen therein."

311 Paragraph 3157, id., provides that:

"Every employer, whether individual, firm, association, company or corporation, employing workmen in such occupation, of itself or through an agent, shall by rules, regulations or instructions, inform all employees in such occupations as to the duties and restrictions of their employment, to the end of protecting the safety of employees in such employment."

Thereby the statute declares the occupations enumerated as inherently hazardous and dangerous to workmen engaged therein, and declares that which is evident to every observant person that the risks and hazards incident to such occupations are unavoidable by the workmen engaged therein. Such occupations designated as hazardous and dangerous, and inherently unsafe are deemed for that reason injurious to the health and dangerous to life and limb of the workmen engaged therein, and clearly fall within the police powers of the State for regulation and control. To the end that the workmen in said occupations may be protected in health, life and limb the law casts upon the employer the specific duty to promulgate rules, regulations and instructions by which all employees in such

312 occupations are informed as to their duties and restrictions of their employment. The safety of the employee engaged in the hazardous occupations is the dominant idea running through the statute. Paragraph 3158, Civil Code, sets forth the conditions, which occurring, fix the employer's liability for personal injuries suffered by employees, to wit:

"When in the course of work in any of the employments or occupations enumerated in the preceding section (Paragraph 3156), personal injury or death by any accident arising out of and in the course of such labor, service and employment, and due to a condition or conditions of such occupation or employment, is caused to

or suffered by any workman engaged therein, in all cases in which such injury or death of such employee shall not have been caused by the negligence of the employee killed or injured, then the employer of such employee shall be liable in damages to the employee injured, or, in case death ensues, to the personal representative \* \* \*"

The conditions occurring which create liability to respond in damages are: that the person injured must be in the service of the proprietor carrying on the hazardous industry; that the industry to be dangerous and hazardous must be one which fairly comes within one or more of the industries enumerated in Paragraph 3156;

313 that at the time the injury was suffered, the employee injured must be engaged in the performance of some duty of his employment; that the accident causing the injury suffered arose from the dangerous and hazardous nature of the service required in the industry as such is ordinarily carried on, and in carrying on such service necessary risks and dangers inherent therein are present as a menace to the workman without knowledge of which and without incurring the danger of injury therefrom he cannot perform such required service. In other words, this statute creates a liability of the master to damages suffered from any accident befalling his servant while engaged in the performance of duties in dangerous occupations without requiring the negligence of the master to be shown as an element of the right to recover; and it likewise takes away from the master his common-law right of defense of assumption of ordinary risk by the servant, and leaves to the master the right to defend upon the grounds that the servant assumed the ordinary risks other than risks inherent in the occupation. The

statute clearly does not require as a condition of liability 314 that the accident causing the injury proximately resulted from the master's negligence, and it as clearly does exclude as a matter of defense the assumption of all ordinary and extraordinary risks inherent in the occupation. Such risks and dangers as are inherent in the occupation are declared to be unavoidable risks and dangers and therefore it necessarily follows that the employee in entering upon his duties does not assume such ordinary inherent risks although known to him. Such risks as he may assume must be risks and dangers other than risks and dangers inherent in the occupation. As was said by Justice Pitney in New York C. R. Co. v. White, U. S. Adv. Ops. 1916, page 247 (not yet officially reported):

"The scheme of the act is so wide a departure from common-law standards respecting the responsibility of employer to employee that doubts naturally have been raised respecting its constitutional validity. The adverse considerations urged or suggested in this case and in kindred cases submitted at the same time are: (a) That the employer's property is taken without due process of law, because he is subjected to a liability for compensation without regard to any neglect or default on his part or on the part of any other person for whom he is responsible, and in spite of the fact that 315 the injury may be solely attributable to the fault of the em-

ee; \* \* \*

"In support of the legislation, it is said that the whole common-law doctrine of employer's liability for negligence, with its defenses of contributory negligence, fellow servant's negligence, and assumption of risk, is based upon fictions, and is inapplicable to modern conditions of employment; that in the highly organized and hazardous industries of the present day the causes of accident are often so obscure and complex that in a material proportion of cases it is impossible by any method correctly to ascertain the facts necessary to form an accurate judgment, and in a still larger proportion the expense and delay required for such ascertainment amount in effect to a defeat of justice; that, under the present system, the injured workman is left to bear the greater part of industrial accident loss, which, because of his limited income, he is unable to sustain, so that he and those dependent upon him are overcome by poverty and frequently become a burden upon public or private charity; \* \* \*"

The statute under consideration in the White case is a compensation statute of the state of New York. The constitutional question involved in that case as shown by the foregoing statement of the matter, is the identical question raised in this case, viz.: the power of the State to create a liability against the employer for accidental injuries to employees which occur without fault of the employer.

In discussing this question, the Court said, after stating the opposing contentions:

"In considering the constitutional question, it is necessary to view the matter from the standpoint of the employee as well as from that of the employer. For, while plaintiff in error is an employer, and cannot succeed without showing that its rights as such are infringed (*Plymouth Coal Co. v. Pennsylvania*, 232 U. S. 531, 544, 58 L. ed. 713, 719, 34 Sup. Ct. Rep. 359; *Jeffrey Mfg. Co. v. Blagg*, 235 U. S. 571, 576, 59 L. ed. 365, 368, 35 Sup. Ct. Rep. 167, 7 N. C. C. A. 570), yet, as pointed out by the court of appeals in the *Jensen Case* (215 N. Y. 526), the exemption from further liability is an essential part of the scheme, so that the statute, if invalid as against the employee, is invalid as against the employer.

"The close relation of the rules governing responsibility as between employer and employee to the fundamental rights of liberty and property is, of course, recognized. But those rules, as guides of conduct, are not beyond alteration by legislation in the public interest. No person has a vested interest in any rule of law, entitling him to insist that it shall remain unchanged for his benefit. *Munn v. Illinois*, 94 U. S. 113, 134, 24 L. ed. 77, 87; *Hurtado v. California*, 110 U. S. 516, 532, 28 L. ed. 232, 237, 4 Sup. Ct. Rep. 111, 292; *Martin v. Pittsburgh & L. E. R. Co.* 203 U. S. 284, 294, 51 L. ed. 184, 191, 27 Sup. Ct. Rep. 100, 8 Ann. Cas. 87; *Second Employers' Liability cases* (*Mondou v. New York, N. H. & H. R. Co.*) 223 U. S. 1, 50, 56 L. ed. 327, 346, 38 L. R. A. (N. S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875; *Chicago & A. R. Co. v. Transbarger*, 238 U. S. 67, 76, 59 L. ed. 1204, 1210, 35 Sup. Ct. Rep. 678. The common law bases the employer's liability for

injuries to the employee upon the ground of negligence; but negligence is merely the disregard of some duty imposed by law; and the nature and extent of the duty may be modified by legislation, with corresponding change in the test of negligence. Indeed, liability may be imposed for the consequences of a failure to comply with a statutory duty, irrespective of negligence in the ordinary sense; safety appliance acts being a familiar instance. *St. Louis, I. M. & S. R. Co. v. Taylor*, 210 U. S. 281, 295, 52 L. ed. 1061, 1068, 28 Sup. Ct. Rep. 616, 21 Am. Neg. Rep. 464; *Texas & P. R. Co. v. Rigsby*, 241 U. S. 33, 39, 43, 60 L. ed. 874, 877, 878, 36 Sup. Ct. Rep. 482."

The court then discusses the liability of the employer according to the maxim, *respondet superior*; the employer's immunity from liability under the common-law doctrine of fellow servant, the general doctrine of assumption of risk, and the doctrine of contributory negligence, and says:

"But it is not necessary to extend the discussion. This court repeatedly has upheld the authority of the states to establish by legislative departures from the fellow-servant rules and other common-law rules affecting the employer's liability for personal injuries to the employee. *Missouri P. R. Co. v. Mackey*, 127 U. S. 205, 208, 32 L. ed. 107, 108, 8 Sup. Ct. Rep. 1161; *Minneapolis & St. L. R. Co. v. Herrick*, 127 U. S. 210, 32 L. ed. 109, 8 Sup. Ct. Rep. 1176; *Minnesota Iron Co. v. Kline*, 199 U. S. 593, 598, 60 L. ed. 322, 325, 26 Sup. Ct. Rep. 159, 19 Am. Neg. Rep. 625; *Tullis v. Lake Erie & W. R. Co.* 175 U. S. 348, 44 L. ed. 192, 20 Sup. Ct. Rep. 318 136; *Louisville & N. R. Co. v. Melton*, 218 U. S. 36, 53, 54 L. ed. 921, 928, 47 L. R. A. (N. S.) 84, 30 Sup. Ct. Rep. 676; *Chicago, I. & L. R. Co. v. Hackett*, 228 U. S. 559, 57 L. ed. 966, 33 Sup. Ct. Rep. 581; *Wilmington Star Min. Co. v. Fulton*, 205 U. S. 60, 73, 51 L. ed. 708, 715, 27 Sup. Ct. Rep. 412; *Missouri P. R. Co. v. Castle*, 224 U. S. 541, 544, 56 L. ed. 875, 878, 32 Sup. Ct. Rep. 606. A corresponding power on the part of Congress, when legislating within its appropriate sphere, was sustained in *Second Employers' Liability Cases* (*Mondou v. New York, N. H. & H. R. Co.*) 223 U. S. 1, 56 L. ed. 327, 38 L. R. A. (N. S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875. And see *El Paso & N. E. R. Co. v. Gutierrez*, 215 U. S. 87, 97, 54 L. ed. 106, 111, 30 Sup. Ct. Rep. 21; *Baltimore & O. R. Co. v. Interstate Commerce Commission*, 221 U. D. 612, 619, 55 L. ed. 878, 883, 31 Sup. Ct. Rep. 621.

"It is true that in the case of the statutes thus sustained there were reasons rendering the particular departures appropriate. Nor is it necessary, for the purposes of the present case, to say that a state might, without violence to the constitutional guaranty of 'due process of law,' suddenly set aside all common-law rules respecting liability as between employer and employee, without providing a reasonably just substitute. \* \* \* it perhaps may be doubted whether the state could abolish all rights of action, on the one hand, or all defenses, on the other, without setting up something adequate in their stead. No such question is here presented, and we intimate no opinion upon it."



319      Discussing the particular features of the case at some length the Court then says:

"Much emphasis is laid upon the criticism that the act creates liability without fault. That is sufficiently answered by what has been said, but we may add that liability without fault is not a novelty in the law. The common-law liability of the carrier, of the innkeeper, or him who employed fire or other dangerous agency or harbored a mischievous animal, was not dependent altogether upon questions of fault or negligence. Statutes imposing liability without fault have been sustained. *St. Louis & S. F. R. Co. v. Mathews*, 165 U. S. 1, 22, 41 L. ed. 611, 619, 17 Sup. Ct. Rep. 243; *Chicago, R. I. & P. R. Co. v. Zerneck*, 183 U. S. 582, 586, 46 L. ed. 339, 340, 22 Sup. Ct. Rep. 229.

"We have referred to the maxim, *respondeat superior*. In a well-known English case, *Hall v. Smith*, 2 Bing. 156, 160, 130 Eng. Reprint, 265, 9 J. B. Moore, 226, 2 L. J. C. P. 113, this maxim was said by Best, Ch. J., to be 'bottomed on this principle, that he who expects to derive advantage from an act which is done by another for him, must answer for any injury which a third person may sustain from it.' \* \* \* In excluding the question of fault as a cause of the injury, the act in effect disregards the proximate cause and looks to one more remote,—the primary cause, as it may be deemed,—and that is, the employment itself. For this, both parties are responsible, since they voluntarily engage in it as co-adventurers, with personal injury to the employee as a probable and foreseen result. \* \* \* in our opinion, laws regulating the responsibility of employers for the injury or death of employees, arising out of the employment, bear so close a relation to the protection of the lives and safety of those concerned that they properly may be regarded as coming within the category of  
320      police regulations. *Sherlock v. Alling*, 93 U. S. 99, 103, 23 L. ed. 819, 820; *Missouri P. R. Co. v. Castle*, 224 U. S. 541, 545, 56 L. ed. 875, 879, 32 Sup. Ct. Rep. 606."

Thus, from the court of ultimate authority over questions affecting constitutional guarantees and rights, we find answers to all of the arguments advanced by the appellant why Chapter VI of Title 14 is in conflict with the Fourteenth Amendment of the Constitution of the United States. I am of the opinion that the statute is free from the objections urged by appellant on the authority of such case.

It is undoubtedly true that our statute which limits the common-law rule of assumption of ordinary risks, to risks other than risks and hazards which are inherent in such occupations and which are unavoidable by the workman thereby contracts the scope of the employer's defense in such cases; but the defense of assumption of risks other than ordinary risks and hazards and risks and hazards which are not inherent in such occupations still remains open to him as before, and may be pleaded in defense as before, only the question must be determined by the jury as a fact and not by  
321      the court as a question of law.

Hence, if the employer "shall by rules, regulations or in-

structions inform all employees in such occupations as to the duties and restrictions of their employment, to the end of protecting the safety of employees in such employments" as required by Paragraph 3157, and during the course of such employment any employee so informed, does an act beyond his duty or in violation of the restrictions of his employment dangerous in character, and suffers injury from an accident occurring, the employer may defend upon the grounds of both assumption of risk by the employee, and if the accident resulted from negligence the employer may interpose the defense of contributory negligence as the case may be. In either event the defense must be specially set forth and tried as an issue of fact. While the statute restricts the employer's right of defense, it does not abolish such rights.

The appellant questions the validity of the statute because the amount recoverable is not limited thereby. Section 6 of Article XVIII, State Constitution, provides that: "the amount  
325 recovered shall not be subject to any statutory limitation;" and, Section 31 Article II, State Constitution, provides that: "No law shall be enacted in this state limiting the amount of damages to be recovered for causing the death or injury of any person." A statute which would attempt to forcibly limit the amount recoverable for personal injuries suffered would be in direct conflict with these plain, simple provisions of the state constitution. Statutes which provide a limited amount in satisfaction of damages and leave to the parties interested the right to elect to abide by its provisions are controlled by other principles of law and justice and should not be confused with statutes imperative in their terms.

The appellant contends as a further grounds for reversal that the court erred in rejecting the evidence of Dr. Bacon as to the condition of appellee's eyes as the Doctor found such condition to be from a personal examination of appellee a short time after the accident.

With regard to the rejection of this testimony the record discloses that witness, Dr. Bacon, was the superintendent in  
323 charge of appellant's hospital department when plaintiff was injured, and that plaintiff was treated for the injuries to his eyes under the supervision of Dr. Bacon, and to some extent plaintiff was treated personally by Dr. Bacon. Dr. Bacon testified fully and extensively as an expert in the matters of infections of wounds to the eyes and cause of such infections. He testified:

"I saw Mendez on the 1st day of July and inspected and saw his eyes. From my examination made of Mendez at that time I know what the condition of his eyes was. \* \* \*

Q. Now, doctor, from your examination made at that time state what the condition of his eyes was?"

The plaintiff objected upon the ground that:

"\* \* \* this is a privileged communication and is also a privileged you might say examination; that the doctor is disqualified to testify as to what he discovered by the examination for the reason that the man was at that time under his professional care and that the plaintiff has not consented to the testimony."

The court sustained the objection. The objection was based upon Subdivision 5 of Paragraph 1677, reading as follows:

"The following persons cannot be witnesses in a civil action:  
 \* \* \* (6) A physician or surgeon cannot be examined, without the consent of his patient, as to any communication made  
 324 by his patient with reference to any physical or supposed physical disease or any knowledge obtained by personal examination of such patient; provided, that if a person offer himself as a witness and voluntarily testify with reference to such communications, that is to be deemed a consent to the examination of such physician or attorney."

The Supreme Court of the United States had before it the interpretation and application of this statute in *A. & N. M. R. Co. v. Clark* 235 U. S. 669, 59 L. ed. 415, and placed a construction on the statute drawing a distinction between knowledge gained by the physician through verbal communications made to him by the patient, and knowledge gained through a personal examination of the patient. The patient may be deemed to have given consent to the doctor's testifying with regard to knowledge gained through verbal communications made by the patient when the patient has referred to such communications in his pleadings or in testimony, but such reference does not open the door to the physician to also testify as to his knowledge gained by a personal examination of the patient, and such is the testimony called for by the question. The  
 325 construction placed on the statute by the Court in the *Clark* case, and the application there made are so evidently correct that I fully concur in both positions there taken, and adopt them as entirely applicable here within the correct understanding of the said statute.

The objection that the verdict is not sustained by the evidence does not point out wherein the failure of the evidence occurs. The claim is made that the verdict is excessive because it rests on the plaintiff's evidence, the testimony of the Doctor having been excluded. In answer to such objection all the law required the record to show is substantial evidence in support of the verdict. This is shown by the record. The matter of the weight of evidence is left with the jury solely, and the jury's determination of that matter will not be disturbed on appeal.

I find no reversible error in the record. Consequently, I am of the opinion the judgment must be affirmed.

(Signed)

D. L. CUNNINGHAM, *Judge*.

We concur:

(Signed) ALFRED FRANKLIN,

*Chief Justice.*

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— — —, *Judge*.

Ross, J. (Dissenting):

I dissent. Later I will file my reasons.

(Signed)

HENRY D. ROSS, *Judge*.



Endorsement: Filed July 2, 1917. C. F. Leonard, Clerk Supreme Court.

*Dissenting Opinion.*

(Title of Court and Cause.)

Ross, J. (Dissenting):

The majority opinion states the facts upon which this case is based. It is clear therefrom the appellant was guilty of no negligent act. Indeed, it is not suggested either by pleadings or otherwise that the accident was caused by any act of appellant. On the contrary the facts would seem to indicate a lack of caution or skill upon the part of appellee.

I agree with the majority opinion that the state is clothed with power to require the employer without fault to compensate  
327 his employee for injury or in case of his death, his dependents. This principle is too well settled to be now questioned. I am satisfied that the state legislature in the absence of constitutional limitations and directions as set forth in Section 7 Art. 18 of the State Constitution could have enacted a law providing for compensation to employees injured without fault of the employer, along the general lines of the various compensation acts of the different states of the Union. I think also that under the provisions of Sec. 7, Art. 18, it was possible to formulate a law giving compensation to the employee when injured without any fault of the employer. In other words, I am of the opinion that the mandate contained in said section and article of the Constitution is not violative of any provision of the Constitution of the United States. My quarrel is with the legislation under that mandate and not the mandate itself.

Chapter VI Title 14, Civil Code 1913, creates a liability without fault but adopts no system or scale of compensation. It leaves the liability to be ascertained by a jury, as under the common law  
328 action for tort. It injects incongruities as to defenses allowed the employer on account of the employee's negligence. These latter I will not discuss here for whatever view is taken of them, they do not relieve the method of ascertaining the liability, of serious and in my opinion, fatal constitutional objections.

In the first place, I will consider the nature of this so-called Employers' Liability Law. It is designated as such both by the Constitution and the legislature. There is not much in the name, the true test of what the right of action is, or was intended to be, must in this case as in all others, be ascertained from the words used to describe and define it.

The Constitution directs the legislature to "enact an Employers' Liability Law, by the terms of which any employer \* \* \* shall be liable for the death or injury caused by any accident due to a condition or conditions of such occupation, in all cases in which such death or injury of such employee shall not have been caused by negligence of the employee killed or injured." Sec. 7, Art. 18.

329 The liability enjoined and contemplated is one heretofore unknown to our laws. Manifestly it is not an employer's liability law in the sense in which those terms are generally used and understood for the reason that liability laws are based on tort. They are in fact the common law right of action for negligence with most of the defenses heretofore allowed abrogated or greatly modified. They do not undertake to create liability without fault, as is done by our legislation.

Rounsville v. Central R. Co., 87 N. J. L. 371, 94 Atl. 392;  
Winfield v. N. Y. Central R. Co., 216 N. Y. 284, 110 N. E. 614;

Ann. Cas. 1916 A 817, Note to Seaboard A. L. B. Co. v. Horton, L. R. A. 1915 C 54.

These cases hold that a law making the employer liable without fault creates a new right of action unknown to the common law. The legislation is a new departure creating a new liability. It is said:

"This legislation is wholly in derogation of the common law. It is legislation which awards compensation for the accidental industrial injuries to be added to the cost of production." Andrejwski v.

Wolverine Coal Co., 182 Mich. 298, 148 N. W. 684.

330 The liability contemplated by our Constitution being therefore a new liability, it was within the power and province of the legislature to fix and regulate it, with no limitation on that power except the employer be given the equal protection of the law and that the method of ascertaining his liability be in accordance with due process of law.

In every other jurisdiction in this country except ours, where this new right of action has been created, the law has been called a "compensation law" and the award to the employee, or his dependents has been called "compensation". The liability or compensation is based upon the average wages and the extent of the injury suffered by the employee. It is not an action to recover "damages" as are the common law action for negligence and the action under the employer's liability law.

For some inexplorable reason the framers of our Constitution enjoined on the legislature the duty of enacting two laws for the same general purpose; namely: the creation of a liability of  
331 the employer without fault. See Secs. 7 and 8, Art. 18. The latter differs from the first principally in that it is called a "compensation law" and authorizes recovery whether the employee causes the injury or not. In both instances the employer is made liable without fault. In the one as well as the other, the liability of the employer is a new one.

Under the Compensation Act, Chapter VH Title 14, Civil Code, the legislature provided a method of recompensing the employee for injury or death by an allowance based upon his ability as a wage earner and the extent of his injury,—in that respect following the compensation laws of other states. The legislature designates the recompense for injury or death under the Employer's Liability

Act as "damages for personal injuries" evidently intending thereby that the damages recovered should be ascertained and measured by the common law standard or by the rules governing in actions sounding in tort. In the matter and quantum of evidence to establish liability thereunder it is practically the same, if not identical, with the Workmen's Compensation Law. The pecuniary liability is, however, unlimited. It contemplates a trial by jury whose only functions, necessarily in most cases, must be the fixing by their verdict the sum to be paid by the employer.

To an injured employee, or in case of his death, there are now open to him or his personal representatives or dependents, three avenues of redress; first, the Workmen's Compensation Law; Second, the Employer's Liability Law; and Third, the Common Law Action for Damages, supplemented by what is commonly known as the Lord Campbell Act. I have indicated somewhat of the nature of the first two. The status of the third or action for negligence, as it exists in this state at present, is as follows:

The common law doctrine of fellow servant is abrogated. The defense of contributory negligence and assumption of risks are questions of fact to be at all times left to a jury, and the right of action to recover damages for injuries may not be abrogated, nor may the amount of recovery be limited by statute. Sections 4, 5, and 6, Art. 18 and Section 31, Art. 2, Constitution.

These provisions of the Constitution were evidently intended to apply only to actions of negligence, in which the measure of damages were to be according to the rules of the common law. Thus understood, the common law action for damages for personal injury is so modified and changed as really and in fact to constitute what is generally known as the employer's liability law.

That the above constitutional provisions do not apply to or affect the newly created rights of action for compensation against the employer is evident or else our Workmen's Compensation Act would be violative of the Constitution, in that it does limit the amount of recovery. For like reasons I think they do not apply to the liability created by the statute known as the Employer's Liability Act. This latter act creating new liability—one not known to the common law and in derogation thereof,—it would seem that the power of the legislature to fix the measure of compensation in disregard of the common law rule is as absolute as under the compensation act.

"The theory upon which the compensation law is based (which is now generally accepted) is that each time an employee is killed or injured there is an economic loss which must be made up or compensated in some way, that most accidents are attributable to the inherent risk of employment,—that is no one is directly at fault—that the burden of this economic loss should be borne by the industry rather than by society as a whole, that a fund should be provided by the industry from which a fixed sum should be set apart as every accident occurs to compensate the person injured or his dependents, for his or their loss." (*Italics mine*). *State v. Industrial Com.*, 92 Ohio St. 434, 450, 111 N. E. 299, L. R. A. 1916 D. 944.

The justification of such an economic rule and its substitution for the common law and employer's liability rule of damages for personal injury is variously stated by the courts, but all are based upon common ground:—That the state owes the duty to its members of preventing their becoming public charges by reason of injuries sustained in the industries of modern civilization, the duty to stop the waste of time and money in protracted and bitterly contested law suits and thereby remove one of the most potent causes of hatred, animosity and distrust between employer and employee, the duty to prevent unjust and bogus claims supported and opposed by perjury and subornation, and to see that bona fide claims for compensation are amicably and expeditiously settled, the duty of relieving the state from the expense of personal injury litigation and finally to see that the injured, or his dependents, receive not a moiety but all that the employer is required to pay.

Appeal of Hotel Bond Co., 89 Conn. 143, 146, 93 Atl. 245; Cunningham v. Northwestern Imp. Co., 44 Mont. 180, 204, 119 Pac. 554;

Hawkins v. Bleakley, 220 Fed. 378, 379;

Stertz v. Industrial Ins. Co., 158 Pac. 256, 258;

Lewis v. Industrial A. C. C. Bd., 156 Pac. 268.

The reasons given by the courts to sustain the compensation laws, it is apparent from what has been said, cannot be invoked in support of our so called employer's liability law. None of the evils "of a difficult problem, affecting one of the most important of social relations," is done away with.

The majority opinion bases its judgment entirely upon the reasoning of the Supreme Court in New York C. R. Co. v. White, 243 U. S. 188, 61 L. ed. —, 37 Sup. Ct. 247, 13 N. C. C. A. 943, in which was considered the New York Workmen's Compensation Act.

It is said in that case that the workmen's compensation act was a substituted system devised to compensate employees or their dependents for injuries in certain hazardous businesses, the measure of damages being based upon the loss of earning power, having regard to the previous wage and the character and duration of the disability and in case of death, benefits according to the dependency of the surviving wife, husband or infant child. Our liability act is not a substitution for former rights and remedies. It creates a new right, not to take the place of old ones, but supplemental or cumulative in its nature. It leaves open to the injured employee or his personal representatives or dependents the common law action of negligence as modified by our Constitution, as also the right to claim under the Compensation Act.

Justice Pitney, in the White case, said that as between the employer and the employee, the common law defenses of the negligence of a co-employee, assumed risk and contributory negligence could be completely abolished without violating any fundamental right of the employer or the law of the land. He cites in support thereof a number of cases upholding the state and federal departures

from the common law rules of liability of the employer, but  
 337 he says, at page 252:

"It is true that in the case of the statutes thus sustained there were reasons rendering the particular departures appropriate. Nor is it necessary, for the purposes of the present case, to say that a state might, without violence to the constitutional guaranty of 'due process of law,' suddenly set aside all common law rules respecting liability as between employer and employee, without providing a *reasonable substitute*. Considering the vast industrial organization of the state of New York, for instance, with hundreds of thousands of plants and millions of wage earners, each employer, on the one hand, having embarked his capital, and each employee, on the other, having taken up his particular mode of earning a livelihood, in reliance upon the probable permanence of an established body of law governing the relation, it perhaps may be doubted whether the state could abolish all rights of action, on the one hand, or all defenses, on the other, *without setting up something adequate in their stead*. No such question is here presented, and we intimate no opinion upon it." (Italics mine.)

There is an intimation here that even the common law defenses of negligence of a fellow servant, assumed risk and contributory negligence may not be arbitrarily abolished without substituting in place thereof some rule or system befitting the conditions and situation, and when it is considered, that the act we now have in hand, is not substitutional—that it does not "set aside one body of rules only to establish another system in its place," but that it is  
 338 purely and simply cumulative, affording an additional, new and heretofore unknown right of action with practically all defenses of the employer abrogated, I think it is quite the supposititious case alluded to by Justice Pitney. This legislation has not attempted to "abolish all rights of action," but has created a new and additional right of action allowing no defense thereto except that it appear that the accident inflicting the injury was caused by the negligence of the employee. To say as the majority opinion does, that the negligence that will defeat a recovery by the employee, may be one of assumption or contribution is a violation and repudiation of the very definition of the right of action as defined. It certainly does not mean the negligence of working in a dangerous or hazardous place, or with careless, unskilled or incompetent co-employees. Neither does it mean contributory negligence, for in that case the injury would be caused by the combined negligence of the employer and employee and not "by the negligence of the employee killed or injured." It means a negligence by the employee at the instant of  
 339 the injury or death and without which there would have been no accident. It must mean some intentional or culpable act or omission. But whatever view may be taken of that, the employer is denied the right to defend by showing that the accident was through no fault of his, and an employee whose negligence caused the injury may fall back on the Workmen's Compensation

Act. If it is "due to a condition or conditions of the occupation," he may sue under the Employers' Liability Act.

In the White case it was decided that the state was competent to set aside one body of rules and to establish another system in its place. There the common law rules governing the liability of the employer to the employee were abrogated and in lieu thereof a system of compensation substituted. Of the substituted system it was said:

"Of course, we cannot ignore the question whether the new arrangement is *arbitrary* and *unreasonable*, from the standpoint of natural justice. Respecting this, it is important to be observed that the act applies only to disabling or fatal personal injuries received in the course of hazardous employment in gainful occupation. Reduced to its elements, the situation to be dealt with is this: Employer and employee, by mutual consent, engage in a common operation intended to be advantageous to both; the employee is to contribute

his personal services, and for these is to receive wages, and,  
340 ordinarily, nothing more; the employer is to furnish plant, facilities, organization, capital, credit, is to control and manage the operation, paying the wages and other expenses, disposing of the product at such prices as he can obtain, taking all the profits, if any there be, and, of necessity, bearing the entire losses. \* \* \*

It is plain that, on grounds of natural justice it is not *unreasonable* for the state, while relieving the employer from responsibility for damages measured by *common-law standards* and payable in cases where he or those for whose conduct he is answerable are found to be at fault, to require him to contribute a *reasonable amount*, and according to a *reasonable and definite scale*, by way of compensation for the loss of earning power incurred in the common enterprise, irrespective of the question of negligence, instead of leaving the entire loss to rest where it may chance to fall,—that is, upon the injured employee or his dependents. Nor can it be deemed *arbitrary* and *unreasonable*, from the standpoint of the employee's interest, to supplant a system under which he assumed the entire risk of injury in ordinary cases, and in others had a right to recover an amount more or less speculative upon proving facts of negligence that often were difficult to prove, and *substitute a system* under which, in all ordinary cases of accidental injury, he is sure of a *definite and easily ascertained compensation*, not being obliged to assume the entire loss in any case, but in all cases assuming any loss beyond the prescribed scale. \* \* \*

In excluding the question of fault as a cause of injury, the  
341 act in effect disregards the proximate cause and looks to one more remote,—the primary cause, as it may be deemed,—and that is, the employment itself. For this, both parties are responsible, since they voluntarily engage in it as coadventurers, with personal injury to the employee as a probable and foreseen result. \* \* \*

Viewing the entire matter, it cannot be pronounced *arbitrary* and *unreasonable* for the state to impose upon the employer the absolute



duty of making a *moderate and definite compensation* in money to every disabled employee, or, in case of his death, to those who were entitled to look to him for support, in lieu of the common-law liability confined to cases of negligence.

This, of course, is not to say that *any scale of compensation*, however insignificant, on the one hand, or onerous, on the other, would be supportable. In this case, no criticism is made on the ground that the compensation prescribed by the statute in question is unreasonable in amount, either in general or in the particular case. Any question of that kind may be met when it arises." (*Italics mine.*)

Our liability law does not relieve "the employer from responsibility for damages measured by common law standards." It does not "require him to contribute a reasonable amount, according to a reasonable and definite scale, by way of compensation for loss of earning power." It is not a substituted system assuring the employee "a definite and easily ascertained compensation" and he is not re-

342 quired to assume "any loss beyond the prescribed scale." It violates the recognized power of "the state to impose upon the employer the absolute duty of making a moderate and definite compensation in money to every disabled employee \* \* \* in lieu of the common law liability confined to cases of negligence", by permitting a recovery of an unlimited amount not for disability alone, as in the White case, but for physical suffering also. It is not a composition of losses sustained in a mutual joint adventure (as Justice Pitney reasons) in which accidental injury is inevitable and is expected, but it places all of the loss without limitation upon one of the "co-adventurers." There is in it no conception of having the employer and employee share in some measure or at all, the loss incidental to personal injuries, a basic consideration for upholding the New York Compensation Law.

It is said if the "scale of compensation" be too small or too large, it would not be "supportable". We have no scale of compensation. It is without limit. It may be ever so "insignificant, on the one hand, or onerous, on the other". Notwithstanding no criticism  
343 of the *of the* compensation prescribed by the New York statute had been made, the Supreme Court laid much stress upon the necessity of the compensation being definite and reasonable and according to a fixed scale. When that is found in the law, it is said the arrangement is not arbitrary and unreasonable from the standpoint of natural justice. A very different case in fact and in reason from the one at bar. Ours is not a system, but a law suit. When an accident happens, instead of adjustment "according to a reasonable and definite scale", both sides prepare for a contest in the courts with all the attendant evils of the old system. When the litigation is finally ended and the fruits thereof, if successful, are paid over to the employee, whether inadequate or excessively large, both he and the employer have been wronged, in that a goodly portion of the recovery has been diverted from the beneficiary into various channels—such as attorney's fees, costs and expenses—all necessary under the system.

Natural justice would dictate that nothing should be taken from the employee, nor would it tolerate the dissipation of the em-

344     ployer's property as an unktion to third or foreign parties. Natural justice would require that the amount to be paid by the employer and received by the employee should be reasonable according to a definite scale and should pass unimpaired and undiminished to the beneficiary.

The right of the state to require the employer without fault to compensate the employee or his dependents, when injured in the service of the employer is referable to the police power. As so many of the courts have said, this power is not capable of exact definition. It is recognized as the right a state has to enact laws for its preservation and betterment. It is elastic in that it expands with social and industrial necessities of the state and may be invoked to promote the health, safety and general welfare of the people. But there is a limit to its exercise. It may not be arbitrarily and capriciously exercised to deprive the citizen either of his property or liberty especially in a case of this kind where there is accruing benefit to neither the individual nor society as a whole. The Supreme Court in the White case has pointed out in no uncertain manner how "a just settlement of a difficult problem, affecting one of the most important of

345     social relations" may be solved, and that solution has not been followed or observed in the least by our legislation.

See also:

Mountain Timber Co. v. Washington, 243 U. S. 219, 61 L. Ed. —, 37 Sup. Ct. 260, 13 N. N. C. A. 927;

Hawkins vs. Bleakley, 243 U. S. 210, 61 L. Ed. —, 37 Sup. Ct. 255.

In the last case, it was contended by the Appellant-employer that the Iowa Compensation Act did not conform to "due process of law," in that it provided that if the employer rejected the act if should be presumed, in an action for damages by the employee, that the injury was the direct result of the employer's negligence. The contention was held unsound as it only cast the burden of proof upon the employer to rebut the presumption of fact and the court said:

"A provision of this nature, not unreasonable in itself and not *conclusive* of the *rights* of the parties, does not constitute a denial of due process of law," citing *Mobile*, Jackson and Kansas City R. R. Co. v. Turnipseed, 219 U. S. 35, 31 Sup. Ct. 136, Ann. Cas. 1912 A. 463. In this last case Justice Lurton said: "\* \* \* it

346     must not under guise of regulating the presentation of evidence, operate to preclude the party from the right to present his defense to the main facts thus presumed. If a legislative provision not unreasonable in itself prescribing a rule of evidence, in either criminal or civil cases, does not shut out from the party affected a reasonable opportunity to submit to the jury in his defense all of the facts bearing upon the issue, there is no ground for holding that due process of law has been denied him."

Thus while it was held the state may change the rules of evidence so as to cast the burden of proof in the first instant upon the employer, it may not take from him all his defenses in actions for damages for personal injury. What may not be done "under the guise" of a rule of evidence surely cannot be accomplished by a direct thrust



of the legislature. In both the Hawkins and Turnipseed cases the court was considering actions for damages for personal injuries where the measure of damages was according to the standards of the common law, and for that reason the rules announced in those cases is the rule that should be applied in the case at bar.

Again in the Hawkins case, speaking of the power of the state to abolish the common law defenses of fellow servant, contributory negligence and assumed risk and authorizing a recovery as "for personal injury" when the employer rejects the compensation act or when both the employer and employee reject it, but reserving unimpaired all these defenses in case the employer accepts and the employee rejects the act, the court said:

"We cannot say that there is here an arbitrary classification within the inhibition of the equal protection clause of the Fourteenth amendment. \* \* \* As already shown, the abolition of such defenses is within the power of the state, and the legislation cannot be condemned when that power has been *qualifiedly exercised* without unreasonable discrimination."

Our liability law not only abolishes the defenses named in a case of the kind we have here, but takes from the employer the right to defend by showing that he was guilty of no fault. The legislation is all in favor of the employee. The employer is given no chance to escape the unlimited liability imposed. The Iowa statute under consideration in the Hawkins case, gave the employer the alternative of paying a reasonable compensation according to a definite scale, refusing which, his only defense was to show that he was guilty of no negligence. Our liability offers no alternative, neither can the employer defend by showing he was without fault. Granting that the employer may defend by showing that the employee contributed to the accident or that he assumed risks not inherent in the occupation, an absurdity, it seems to me, still he is deprived of the fundamental right of showing he was without fault, and at the same time made liable for unlimited damages, as in a suit for personal injury according to the standards of the common-law,—and the law has provided no avenue of escape for him. This, it would seem, is "unreasonable discrimination" against the employer and in favor of the employee. That all defenses may be abolished and absolute liability imposed without fault, according to a reasonable and definite scale is not questioned, but it is inconceivable that one who is guilty of no wrong should be made liable to an injured employee in damages unlimited and unlimitable.

I am constrained to hold that the so-called Employers' Liability Act in so far as the procedure for the enforcement of the right of action created thereunder is concerned, is not a proper and lawful exercise of the police power of the state and further that it denies the employer due process of law in that it deprives him of the right to present all his defenses, at the same time allowing unlimited damages against him according to the standard of damages at common law.

At the expense of extending this opinion,—too long already—I wish to add: The right of action created by the act is not limited to

the employee, or in case of death, to his dependents. It extends to the parents, whether dependent or not, and the personal representative for the benefit of the estate, in the absence of certain enumerated classes. Thus an employer without fault may be mulct in damages to an estate which would go to heirs in no way dependent upon the deceased or, there being no heirs, it would escheat. This I conceive to be contrary to every dictate of natural justice. All employers in the occupations mentioned are not millionaires—some are just beginning, with no more means than the men they employ. It reaches the small contractor and small mine owner as well as the  
350 larger concerns of the state. Yet these, under the law guilty of nothing other than a laudable ambition to better their condition, and incidentally build up and develop the industries of the state, may be forced to contribute to an estate that owes nothing or that may go to heirs in no way dependent on the deceased, or that may be escheated.

The workmen's compensation laws of the different states and foreign countries without exception, so far as I know, limit the benefits to the employee, or in case he dies, to his dependents.

In view of the fact that our Workmen's Compensation Act is not satisfactory to either employer or employee and our Employers' Liability Act, as shown, is clearly unconstitutional, as I see it, I feel constrained to express my opinion more at length than I otherwise would.

The Workmen's Compensation Act is generally conceded to give inadequate compensation for death and injury. It is compulsory on the employer only. The employee's option to accept  
351 under it can be exercised after the injury; Consolidated Arizona Smelting Co. v. Ujack, 15 Ariz. 382, 139 Pac. 465, and is personal to the employee. The beneficiaries of the deceased cannot exercise the option at all or in any case. Behringer v. Inspiration Consolidated Copper Co., 17 Ariz. 232, 149 Pac. 1065. It therefore is not a "just settlement" of the rights and wrongs growing out of the relation of employer and employee. This confused, chaotic and unsatisfactory condition has had the attention of both employer and employee with a view of remedying it, but owing to a lack of co-operation by the last legislature with a joint committee representing both sides, nothing was accomplished. It is devoutly to be wished that a just, reasonable and equitable law following the lines of other states, settling the question, may soon find a place in this state.

(Signed)

HENRY D. ROSS, *Judge*.

Endorsement: Filed Sept. 19, 1917. C. F. Leonard, Clerk Supreme Court.

352

In the Supreme Court of the State of Arizona.

No. 1508.

INSPIRATION CONSOLIDATED COPPER COMPANY, a Corporation,  
Appellant,

vs.

CEFERINO MENDEZ, Appellee.

*Motion for Rehearing.*

Comes now Inspiration Consolidated Copper Company, a corporation, the appellant in the above entitled cause, wherein the decision of this court was announced on the second day of July, 1917, affirming the judgment of the Superior Court of Gila County, State of Arizona, and moves the court for an order granting a rehearing of said cause in this court.

The grounds of this motion are as follows:

1. The court sustains the validity of the Employers' Liability Law upon the authority solely of the decision of the United States Supreme Court in the case of New York Central Railroad Company vs. White, decided March 6, 1917, and reported in U. S. Advance Opinions, 1916, of the Lawyers' Co-operative Publishing Company, in pamphlet No. 9, issued April 1, 1917, at page 247, long subsequent to the submission of this cause to this court. The decision of the United States Supreme Court does not support the validity of the Liability Law, but on the contrary announces principles which cannot be reconciled with that law and require its condemnation.

2. The court in construing the Liability Law declares that under that law there can be no assumption of risk by the employee as to any of the risks inherent in the work in which he is engaged upon the theory that all such risks are ipso facto unavoidable by him regardless of what the fact may be. This is an unwarranted and erroneous construction of the law.

3. The court holds that the exclusion of the testimony of Dr. Bacon as to the condition of the plaintiff's eye when he first appeared at the hospital and presented himself for treatment was correct. This ruling is rested upon the decision of the Supreme Court of the United States in the case of Arizona & New Mexico Railroad Company vs. Clark, 235 U. S. 669. The Clark case does not involve the question here presented as to the waiver of the privilege by the plaintiff by his voluntarily testifying concerning the treatment.

4. The court does not consider at all the important question upon which an assignment of error was based as to whether a workman who has accepted compensation under the Compensation Act can, notwithstanding such acceptance, maintain suit under the Liability

Law. This question merits the serious consideration of this court and the error of the lower court in its rulings upon it alone warrants the reversal of the judgment.

Appellant files herewith its brief in support of this motion.

Wherefore appellant moves that a rehearing of this cause be ordered.

Respectfully submitted,

EDWARD W. RICE,  
*Attorney for Appellant.*

(Endorsement:) Filed July 17, 1917. C. F. Leonard, Clerk Supreme Court.

355 And heretofore and to-wit on the 25th day of September, 1917, being one of the regular juridical days of said Supreme Court of the State of Arizona, the following order was made and entered of record in said cause in words and figures following to-wit:

At this day it is ordered That the motion for Re-hearing filed herein by appellant be and the same is hereby denied.

356 In the Supreme Court of the State of Arizona.

No. 1508.

INSPIRATION CONSOLIDATED COPPER COMPANY, a Corporation,  
Appellant,

vs.

CEFERINO MENDEZ, Appellee.

*Petition for Writ of Error.*

To the Honorable Alfred Franklin, Chief Justice of the Supreme Court of the State of Arizona:

Inspiration Consolidated Copper Company, a corporation, the appellant in the above entitled cause, presents this its petition, and prays that a writ of error be allowed and issued in said cause from the Supreme Court of the United States to the Supreme Court of the State of Arizona, for the review of the judgment and proceedings of the Supreme Court of the State of Arizona in said cause, and that an order be made fixing the amount of security which the appellant shall give and furnish upon said writ of error in order to stay the execution of said judgment and all of the proceedings in said  
357 cause until the determination thereof by the Supreme Court of the United States, and that the supersedeas bond on writ of error presented by appellant in accordance with such order for security be approved.

This action was instituted in the Superior Court of Gila County, State of Arizona, by appellee. Ceferino Mendez, against appellant, for the recovery of damages for personal injuries. Said action was

prosecuted wholly to enforce a liability created by Chapter VI of Title 14 of the Revised Statutes of Arizona of 1913, commonly known as the Arizona Employer's Liability Law. The appellant insisted at all times in the trial court that such law was unconstitutional and void, that it deprived appellant of its property without due process of law, and denied to it the equal protection of the law, and violated the Fourteenth Amendment to the Constitution of the United States. It urged this objection under its general demurrer, which was overruled, specially pleaded the same in paragraph II of its answer to the amended complaint, objected to all testimony at the beginning of the trial on this specific ground, and moved the court to direct the jury to find for the defendant for the same reason. Likewise, 358 after judgment for plaintiff, appellant seasonably moved for a new trial, urging the same point in divers ways. Upon appeal to the Supreme Court of the State of Arizona, appellant in its assignment of errors specifically urged the invalidity of this law because of its conflict with the Fourteenth Amendment to the Constitution of the United States. The Supreme Court of Arizona rendered its decision on the 2nd day of July, 1917, sustaining said law and holding that it did not violate the Fourteenth Amendment. Thereafter, and within the time prescribed by law and the rules of said Supreme Court of the State of Arizona, appellant presented and filed its petition for rehearing, which petition was denied by the Supreme Court of the State of Arizona on the 25th day of September, 1917.

Wherefore your petitioner feels aggrieved, and prays that a writ of error be allowed as aforesaid, and its supersedeas bond on writ of error be approved, and that a transcript of the record, proceedings, and papers in said cause, duly authenticated, be ordered sent to the Supreme Court of the United States at Washington, D. C., under the rules of said court and the statutes of the United States, that said record, proceedings, and judgment may be inspected and 359 corrected according to law.

EDWARD W. RICE,  
*Attorney for Petitioner.*

Filed: Nov. 19, 1917. C. F. Leonard, Clerk Supreme Court.

Received a copy of the within Petition for Writ of Error this 17th day of November, 1917.

A. C. McKILLOP,  
*Attorney for Appellee.*

In the Supreme Court of the State of Arizona.

No. 1508.

INSPIRATION CONSOLIDATED COPPER COMPANY, a Corporation,  
Appellant,

vs.

CEFERINO MENDEZ, Appellee.

*Supersedeas Bond on Writ of Error.*

Know all men by these presents:

That Inspiration Consolidated Copper Company, a corporation organized under the laws of the State of Maine and qualified  
360 to engage in business in the State of Arizona, as principal, and United States Fidelity and Guaranty Company, a corporation organized under the laws of the State of Maryland and qualified to engage in business in the State of Arizona, as surety, are held and firmly bound unto the above named Ceferino Mendez in the sum of Seventy Five Hundred Dollars, to be paid to said Ceferino Mendez, for the payment of which well and truly to be made we bind ourselves, and each of us, our, and each of our, successors and assigns, jointly and severally, firmly by these presents.

Made, sealed, and dated this 17th day of November, 1917.

The conditions of the above obligation are such that

Whereas in that certain action above entitled, the above named principal has petitioned for the allowance of a writ of error from the Supreme Court of the United States to the Supreme Court of the State of Arizona to examine and reverse the judgment rendered on the 2nd day of July, 1917, in the above entitled action by the Supreme Court of the State of Arizona, affirming the judgment theretofore rendered in said action in the Superior Court of Gila County, State of Arizona.

361 Now, therefore, if said principal, Inspiration Consolidated Copper Company, a corporation, shall prosecute its writ of error to effect, and if it fail to make its plea good shall answer all damages and costs, then this obligation shall be void; otherwise to remain in full force and effect.

In witness whereof said principal and said surety have caused these presents to be executed as of the day and year first above written.

INSPIRATION CONSOLIDATED COPPER  
COMPANY, *Principal,*

By C. E. MILLS,

*Its General Manager, and*

EDWARD W. RICE,

*Its Attorney of Record.*

UNITED STATES FIDELITY AND GUAR-  
ANTY COMPANY, *Surety,*

[SEAL.]

By J. F. MAYER.

*Its Attorney in Fact.*

The foregoing bond and the surety therein named are approved this 19th day of November, 1917.

ALFRED FRANKLIN,  
*Chief Justice of the Supreme Court of Arizona.*

362 Received a copy of the within Supersedeas Bond on Writ of Error this 17th day of November, 1917.

A. C. McKILLOP,  
*Attorney for Appellee.*

Filed: Nov. 19, 1917. C. F. Leonard, Clerk Supreme Court.

In the Supreme Court of the State of Arizona.

No. 1508.

INSPIRATION CONSOLIDATED COPPER COMPANY, a Corporation,  
Appellant,

VS.

CEFERINO MENDEZ, Appellee.

*Order Fixing Amount of Bond.*

The appellant, Inspiration Consolidated Copper Company, a corporation, having this day filed its petition for a writ of error from the Supreme Court of the United States to the Supreme Court of the State of Arizona to review the judgment of the Supreme Court of Arizona in the above entitled cause rendered on July 2, 1917, together with an assignment of errors, within due time, and praying that an order be made fixing the amount of security which appellant should give and furnish upon said writ of error, and that upon the giving of such security all further proceedings of the Supreme Court of Arizona be suspended and stayed until the determination of said writ of error by the Supreme Court of the United States, and said petition having this day been allowed,

It is ordered that upon the appellant, Inspiration Consolidated Copper Company, filing with the Clerk of this court a good and sufficient bond in the sum of Seventy Five Hundred Dollars, conditioned as required by law, and the approval of said bond by the undersigned, all further proceedings in the above entitled action in the Supreme Court of Arizona and the trial court be and they are hereby suspended and stayed until the determination of said writ of error by the Supreme Court of the United States.

364 Dated this 19th day of November, 1917.

ALFRED FRANKLIN,  
*Chief Justice of the Supreme Court of Arizona.*

Filed: Nov. 19, 1917. C. F. Leonard, Clerk Supreme Court of Arizona.



In the Supreme Court of the State of Arizona.

No. 1508

INSPIRATION CONSOLIDATED COPPER COMPANY, a Corporation,  
Appellant,

VS.

CEFERINO MENDEZ, Appellee.

*Assignment of Errors.*

Inspiration Consolidated Copper Company, a Corporation, appellant in the above entitled cause, files the following assignment of errors, upon which it will rely in the prosecution of its writ of error in the above entitled cause from the judgment of the Supreme Court of the State of Arizona rendered on the 2nd day of July, 1917, affirming the judgment of the Superior Court of Gila County, State of Arizona.

1. The trial court erred in overruling the demurrer to plaintiff's complaint. It was urged in support of this demurrer that Chapter VI of Title 14 of the Revised Statutes of Arizona of 1913, under the provisions of which this action was instituted and prosecuted, was unconstitutional and void, in that it created unlimited liability without fault, and that it deprived the defendant and appellant of its property without due process of law, and denied to it the equal protection of the laws, and violated Section 1 of Article XIV of the Amendments to the Constitution of the United States.

2. The trial court erred in overruling the objection on the part of defendant and appellant to the reception of any testimony in the cause. Said objection was specifically based upon the same grounds as were urged in support of the demurrer, as set forth in Assignment No. 1.

366 3. The trial court erred in denying the motion and request of defendant and appellant that the jury be directed to return a verdict in favor of the defendant. This motion and request was based upon the same ground of the invalidity of the statute under which suit was brought as is fully set forth under Assignment No. 1.

4. The trial court erred in denying the motion for a new trial. In support of this motion defendant and appellant urged the invalidity of the law under which the suit was brought upon the ground and for the reasons set forth in Assignment No. 1.

5. The Supreme Court of Arizona erred in affirming the judgment of the trial court for each of the reasons set forth in each of the assignments numbered 1 to 4, inclusive.

6. The Supreme Court of Arizona erred in affirming the judgment and holding that Chapter VI of Title 14 of the Revised Statutes of Arizona of 1913, commonly known as the Arizona Employer's Liability Law, is valid, and that the same does not violate the Four-



367     teenth Amendment to the Constitution of the United States,  
for the reason that said law creates an unlimited liability without  
fault, and deprives the appellant of its property without  
due process of law, and denies to it the equal protection of the laws,  
and violates said Fourteenth Amendment.

EDWARD W. RICE,  
*Attorney for Plaintiff in Error.*

Endorsement: Filed Nov. 19, 1917. C. F. Leonard, Clerk Supreme Court.

In the Supreme Court of the State of Arizona.

No. 1508.

INSPIRATION CONSOLIDATED COPPER COMPANY, a Corporation,  
Appellant,

vs.

CEFERINO MENDEZ, Appellee.

*Prayer for Reversal.*

368     Comes now Inspiration Consolidated Copper Company, a  
corporation, the plaintiff in error, and prays for a reversal of  
the judgment rendered by the Supreme Court of the State of  
Arizona on the 2nd day of July, 1917, affirming the judgment of the  
Superior Court of Gila County, State of Arizona, in the above entitled  
cause.

Dated this 19 day of November, 1917.

EDWARD W. RICE,  
*Attorney for Plaintiff in Error.*

Endorsement: Filed Nov. 19, 1917. C. F. Leonard, Clerk Supreme Court.

In the Supreme Court of the State of Arizona.

No. 1508.

INSPIRATION CONSOLIDATED COPPER COMPANY, a Corporation,  
Appellant,

vs.

CEFERINO MENDEZ, Appellee.

369     *Order of Allowance of Writ of Error.*

On this 19th day of November, 1917, Inspiration Consolidated Copper Company, a corporation, by its counsel, regularly presented to the undersigned, Alfred Franklin, the Chief Justice of the Su-

preme Court of the State of Arizona, which is the highest court of said State in which the above entitled action could be heard, its petition for the allowance of a writ of error from the Supreme Court of the United States to the Supreme Court of the State of Arizona, and for the fixing of the amount of security to be given on said writ to stay the execution of the judgment, together with its assignment of errors and its prayer for reversal; and it appearing from the petition filed herein, and the record filed herewith, that said petition ought to be granted, and that a transcript of the record, proceedings, and papers upon which the judgment of said Supreme Court of the State of Arizona was rendered, properly certified, should be sent to the Supreme Court of the United States, as prayed for in said petition, and the amount of security to be given having been fixed by the undersigned at the sum of Seventy Five Hundred Dollars, 370 and a bond in the sum so fixed, properly conditioned, having been presented to the undersigned.

It is therefore ordered that the writ of error be allowed, that the bond of petitioner be and it is hereby approved, and may operate as a supersedeas, and that a true copy of the record and assignment of errors, and all proceedings had in the above entitled cause in the Superior Court of Gila County, State of Arizona, and in the Supreme Court of the State of Arizona, together with all other papers and proceedings required by law, shall be transmitted to the Supreme Court of the United States, properly certified as the law directs, that the said Supreme Court of the United States may inspect the same and do what according to law should be done.

ALFRED FRANKLIN,  
*Chief Justice of the Supreme Court  
of the State of Arizona.*

371 UNITED STATES OF AMERICA,  
*District of Arizona, ss:*

I, Mose Drachman, Clerk of the United States District Court for the District of Arizona, do hereby certify that the above and foregoing is a true and correct copy of an order allowing writ of error in the case of Inspiration Consolidated Copper Company, a corporation, appellant, versus Ceferino Mendez, appellee, on writ of error to the Supreme Court of the United States, as the same appears from the original order on file and of record in my office at Tucson, Arizona.

Witness my hand and seal of said court affixed hereto at Tucson, Arizona, this 20 day of November, 1917.

[SEAL.]

MOSE DRACHMAN,  
*Clerk of the United States District Court.*

Endorsement: Filed November 24, 1917. C. F. Leonard, Clerk Supreme Court.

372 In the Supreme Court of the State of Arizona.

*Clerk's Certificate.*

SUPREME COURT,

*State of Arizona, ss:*

I, C. F. Leonard, Clerk of the Supreme court of the State of Arizona, do hereby certify that the foregoing pages, numbered from 1 to 371, inclusive, contain a full, true and complete transcript of the original Complaint, original Answer, amended Complaint, Answer to Amended Complaint, Minute entries of the Superior Court, transcript of the reporter's notes, omitting the examination of the jurors; instructions requested by Defendant, instructions given by the trial court, the Verdict, Judgment of the trial court, motion for a new trial, Notice of appeal to the Supreme Court, Supersedeas Bond on appeal, Assignments of error on appeal, Judgment of Supreme Court,

Opinion of the Supreme Court, dissenting opinion of Judge  
373 Ross, Petition for Re-hearing Order denying Petition for Re-hearing Petition for Writ of Error, Assignments of Error, Prayer for Reversal, Order fixing amount of Bond, Supersedeas Bond on Writ of Error, and Order allowing Writ of Error, in cause No. 1508, wherein Inspiration Consolidated Copper Company, a corporation, is Appellant, and Ceferino Mendez is Appellee; as the same remain on file and of record in my office; being all that portion of the original record indicated by the appellant herein by its præcipe filed in said cause, as necessary to the consideration of the questions to be reviewed on Writ of Error to the Supreme Court of the United States.

And I further certify that the Writ of Error and Citation showing service thereon, and hereto attached, is the original Writ of Error and Citation issued and allowed by the said Supreme Court of the State of Arizona in the above entitled cause.

In witness whereof, I have hereunto set my hand and affixed the seal of the Supreme Court of the State of Arizona, at the City of Phoenix, this 27th day of December, A. D., 1917.

[Seal Supreme Court, State of Arizona.]

C. F. LEONARD,

*Clerk of the Supreme Court of the State of Arizona.*

374 In the Supreme Court of the State of Arizona.

No. 1508.

INSPIRATION CONSOLIDATED COPPER COMPANY, a Corporation,  
Appellant,

vs.

CEFERINO MENDEZ, Appellee.

*Writ of Error.*

UNITED STATES OF AMERICA, ss:

The President of the United States of America to the Honorable Judges of the Supreme Court of the State of Arizona, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of the State of Arizona before you, or some of you, being the highest court of the said State in which a decision could be had in the said suit between Inspiration Consolidated Copper Company, a corporation, and Ceferino Mendez, wherein was drawn in question the validity of a statute of said State of Arizona, on the ground of its being repugnant to the Constitution of the United States, and the decision was in favor of its validity, a manifest error hath happened to the said Inspiration Consolidated Copper Company, a corporation, as by its complaint appears. We, being willing that error, if any hath hap-

375 pened, should be duly corrected, and full and speedy justice done to the parties aforesaid, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington within sixty (60) days from the date hereof, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Edward Douglass White, Chief Justice of the said Supreme Court of the United States, the 20th day of November, in the year of our Lord one thousand nine hundred and seventeen.

[Seal United States District Court, District of Arizona.]

MOSE DRACHMAN,  
Clerk of the United States District Court  
for the District of Arizona.

The foregoing writ is hereby allowed this 21st day of November, 1917.

ALFRED FRANKLIN.

*Chief Justice of the Supreme Court  
of the State of Arizona.*

[Endorsed:] No. 1508. In the Supreme Court of the State of Arizona. Inspiration Consolidated Copper Company, a corporation, Appellant, vs. Ceferino Mendez, Appellee. Writ of Error. Edward W. Rice, Attorney at Law, Globe, Arizona. Filed Nov. 24, 1917. C. F. Leonard, Clerk Supreme Court.

376 Received a copy of the within Writ of Error this 22nd day of November, 1917.

A. C. McKILLOP,  
GEO. F. SENNER,  
*Attorneys for Plaintiff and Appellee, Ceferino Mendez.*  
A. C. McKILLOP.  
GEO. F. SENNER.

377 In the Supreme Court of the State of Arizona.

No. 1508.

INSPIRATION CONSOLIDATED COPPER COMPANY, a Corporation,  
Appellant,

vs.

CEFERINO MENDEZ, Appellee.

*Citation on Writ of Error.*

To Ceferino Mendez, Greeting:

You are hereby cited and admonished to be and appear before the Supreme Court of the United States, to be holden in the City of Washington, D. C., within sixty days from the date hereof, pursuant to a writ of error filed in the office of the Clerk of the Supreme Court of the State of Arizona wherein Inspiration Consolidated Copper Company, a corporation, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against said plaintiff in error, as in said writ of error mentioned, should not be corrected and reversed and justice done in that behalf.

Witness the Honorable Edward Douglass White, Chief Justice of the Supreme Court of the United States, this 21st day of November, 1917.

ALFRED FRANKLIN,  
*Chief Justice of the Supreme Court  
of the State of Arizona.*

Attest:

[Seal Supreme Court; State of Arizona.]

C. F. LEONARD,  
*Clerk Supreme Court of the State of Arizona.*

378 Received a copy of the within Citation this 22nd day of November, 1917.

A. C. McKILLOP,  
GEO. F. SENNER,

*Attorneys for Plaintiff and Appellee, Ceferino Mendez.*

[Endorsed:] No. 1508. In the Supreme Court of the State of Arizona. Inspiration Consolidated Copper Company, a corporation, Appellant, vs. Ceferino Mendez, Appellee. Citation on Writ of Error. Edward W. Rice, Attorney at Law, Globe, Arizona. Filed Nov. 24, 1917. C. F. Leonard, Clerk Supreme Court.

379 Supreme Court of the United States, October Term, 1917.

No. 819.

THE INSPIRATION CONSOLIDATED COPPER COMPANY, Plaintiff in Error,

VS.

CEFERINO MENDEZ, Defendant in Error.

*Specification of Points to Be Relied upon and Designation of Portions of Transcript of Record Necessary to Be Considered by the Court.*

Plaintiff in error, the Inspiration Consolidated Copper Company, states, pursuant to the provisions of paragraph 9 of Rule 10 of the Rules of Practice of the Supreme Court of the United States, that, in the future prosecution of the above entitled cause, it intends to rely for reversal of the judgment of the Supreme Court of Arizona, upon the following:

That the provisions of Chapter VI of Title 14 of the Revised Statutes of Arizona of 1913, commonly called and known as the Employers' Liability Law, as construed and applied by the Supreme Court of Arizona, are unconstitutional and void in that they deprived plaintiff in error of its property without due process of law and denied to it the equal protection of the law, and therefore violated the Fourteenth Amendment to the Constitution of the United States.

For such purpose plaintiff in error deems it necessary to reproduce in print for the convenience and consideration of this Honorable Court only the following parts of the original transcript of record on file in this cause, viz.:

1. Complaint, pages 1 to 4.
2. Answer, pages 4 to 5.
3. Amended complaint, pages 6 to 9.
  4. Answer to amended complaint, pages 9 to 14.
- 380 5. Order overruling demurrer, pages 15 to 16.
6. Verdict, page 281.
7. Judgment, pages 281 to 283.

8. Motion for new trial, pages 283 to 284.

9. Excerpts from transcript of record—

a. Objections to introduction of any further testimony, bottom of page 36 and top of page 37, including the ruling of the court thereon and exceptions thereto.

b. Instructions requested by defendant, viz., Instruction to return verdict for defendant, page 273 B, and page 278.

c. Extracts from the charge as given, viz., the first, second and third instructions on pages 271 and 272, as to the scope of the Liability Law, and the following instructions to and including that on page 272, to the effect that the defendant's negligence bars the suit, and the further instruction on page 272 that the injury must be due to the condition of the work as defined.

10. Notice of appeal, page 287.

11. Assignment of errors in State Court, pages 288-291.

12. Opinion of Supreme Court of Arizona, pages 294-326.

13. Dissenting opinion of Judge Ross, pages 326-351.

14. Motion for rehearing, pages 352-354.

15. Order denying motion for rehearing, page 355.

16. Petition for writ of error, pages 356 to 359.

17. Assignment of errors, pages 364 to 367.

18. Prayer for reversal, pages 367 to 368.

19. Order fixing amount of bond, pages 362 to 363.

20. Supersedeas bond on writ of error, pages 359 to 362.

21. Order allowing writ of error, pages 369 to 370.

22. Certificate of Clerk of United States District Court, page 371.

23. Certificate of Clerk of Supreme Court of Arizona, pages 372 to 373.

24. Writ of error.

25. Citation.

381 Respectfully submitted,

EDWARD W. RICE,

HARVEY M. FRIEND,

*Attorneys and Counsellors for The Inspiration Consolidated Copper Company.*

DISTRICT OF COLUMBIA,

*City of Washington, ss:*

Harvey M. Friend, being first duly sworn, deposes and says he is one of the counsel for the plaintiff in error in the foregoing above-entitled cause. That on the 31st day of January, 1918, he served the foregoing specification of points and designation of parts of record to be printed upon A. C. McKillop, attorney at law of Globe, Arizona, one of the attorneys and counsel for the defendant in error in this cause, by mailing him a true and correct copy thereof by registered letter, as appears from the registry receipt thereof hereto attached.

HARVEY M. FRIEND.



Subscribed and sworn to before me this 31st day of January, 1918.

[Seal Chas. E. Alden, Notary Public, District of Columbia.]

CHAS. E. ALDEN,  
*Notary Public in and for Washington, D. C.*

My Commission Expires Sept. 13, 1922.

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382 [Endorsed] 819. 26286. No. 819. October Term, 1917.  
Inspiration Consolidated Copper Company, Pltiff. in Error, vs. Ceferino Mondez, Deft. in Error. Specification of Points to be relied upon & designation of parts of transcript of record to be printed. Edward W. Rice, Harvey M. Friend, Attorneys and Counsellors at Law, Offices, Suite 501-4 Ouray Building, Washington, D. C.

383 [Endorsed:] File No. 26286. Supreme Court U. S., October Term, 1917. Term No. 819. Inspiration Consolidated Copper Company, Plaintiff in Error, vs. Ceferino Mendez. Statement of points to be relied upon and designation by plaintiff in error of parts of record to be printed, with proof of service of same. Filed January 31, 1918.

Endorsed on cover: File No. 26,286. Arizona Supreme Court. Term No. 819. Inspiration Consolidated Copper Company, plaintiff in error, vs. Ceferino Mendez. Filed January 18th, 1918. File No. 26,286.



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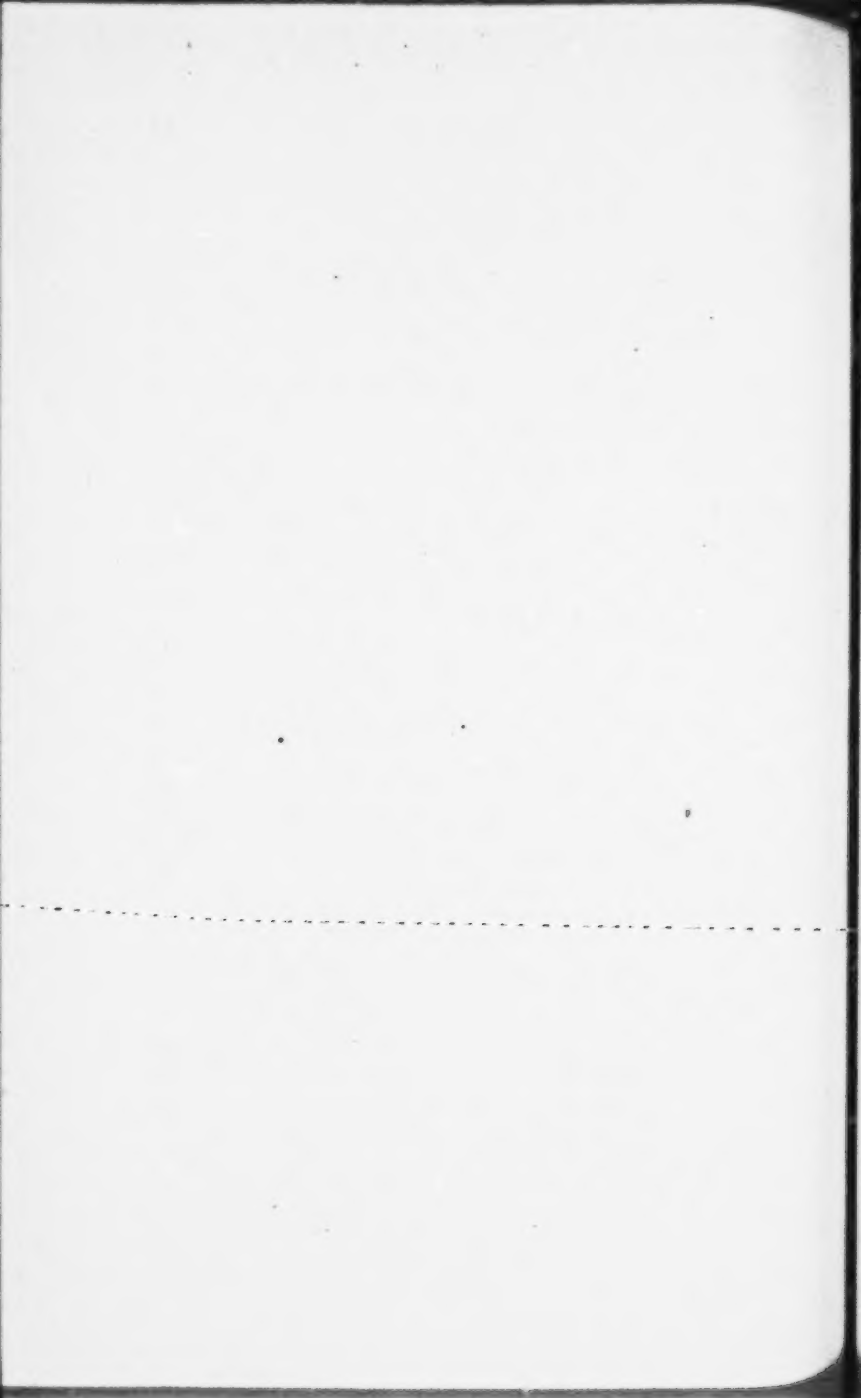
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IN THE  
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

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**No. 332.**

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INSPIRATION CONSOLIDATED COPPER COMPANY,  
PLAINTIFF IN ERROR,

*vs.*

CEFERINO MENDEZ, DEFENDANT IN ERROR.

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**BRIEF OF PLAINTIFF IN ERROR.**

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**I. Statement of the Case.**

**(a) *The Facts:***

This cause comes to this court on writ of error to review the decision of the Supreme Court of the State of Arizona affirming the judgment of the Superior Court of Gila County in favor of the plaintiff in a personal-injury action.

The plaintiff, Mendez, was a miner of long experience, familiar with the operation of drills and the handling of explosives. At the time of the accident out of which the

action arose he was employed by the defendant in its mine. It was arranged between Mendez and his co-workers that he should light the fuses in certain holes drilled in the mine and loaded with explosives, and as soon as that was accomplished he should open a valve upon the compressed-air pipe near at hand and thus release the current of air in the drift so as to clear the mine of the powder smoke from the impending blasts and enable the miners to resume their labors thereafter in comfort. The fuses were of such length as to afford ample time for Mendez, after lighting them, to turn on the air and to reach a place of safety before the powder would explode.

The pressure of the air in the pipe against the valve was considerable. Mendez stooped over the valve, grasped with both hands the valve handle—a shaft some six inches long—and opened the valve. The swiftly outrushing air current carried some foreign body, rock or metal particles into his face and against his right eye. Infection set in, a corneal ulcer developed, and the visual power of the eye was practically destroyed.

(b) *The Law:*

Suit was instituted under the provisions of chapter 6 of title 14 of the Revised Statutes of Arizona of 1913, locally known as the Arizona Employers' Liability Law. No question of the employer's negligence arose in the case, either as a matter of pleading or of proof. The litigation was conducted throughout upon the theory that negligence was an element entirely foreign to the liability declared in the law and sought to be enforced in this action. A verdict was returned by the jury in favor of the plaintiff for \$5,500, less a credit for moneys paid, and judgment was entered accordingly.

(c) *The Attack on the Law:*

In the trial court the defendant repeatedly challenged the validity of the liability law on the ground that it violated

the Fourteenth Amendment. The attack was made by demurrer (Transcript of Record, page 2), by answer (Transcript of Record, page 5), by objection to the introduction of any testimony (Transcript of Record, page 8), by requested instructions (Transcript of Record, page 10), and on motion for a new trial (Transcript of Record, page 11).

By proper specific assignments of error these attacks on the constitutionality of the law were presented to the State Supreme Court (Transcript of Record, pages 12 and 13). The highest court of the State considered the constitutional question at length in its opinion (Transcript of Record, page 14, folio 295; pages 17 to 25, folios 304 to 322; pages 27 to 36, folios 326 to 351, inclusive). The court sustained the law and affirmed the judgment (Transcript of Record, page 13, folio 292).

The validity of this law is the sole question in this case on this writ.

## **II. Specification of Errors.**

The assignment of errors filed herein (Transcript of Record, pages 42 and 43, folios 365 to 367) raises this single point of the validity of the Arizona Employers' Liability Law. This point may be restated as follows: That the provisions of chapter 6 of title 14 of the Revised Statutes of Arizona of 1913, called the Employers' Liability Law, as construed and applied by the Supreme Court of Arizona, are unconstitutional and void, in that they deprive the plaintiff in error of its property without due process of law, and deny to it the equal protection of the laws, and therefore violate the Fourteenth Amendment to the Constitution of the United States, for the reasons that the law seeks to impose an unlimited liability in the absence of negligence, and is unreasonable, arbitrary and confiscatory.

### III. ARGUMENT.

It is the contention of plaintiff in error that the Arizona statute deals only with individual rights and liabilities, and that it is not a measure designed to advance the public interest by achieving social justice. It is the further contention of plaintiff in error that whether the law be held to relate only to private rights or whether it be deemed charged with a public interest, it must in either event be held invalid, as contrary to natural justice, and unreasonable and confiscatory in its nature, and therefore in violation of the fundamental provisions of the Fourteenth Amendment.

The argument will be developed under the following heads:

1. The Law: Its place in the legal system of Arizona, and its interpretation, operation and effect.

2. Its validity as a labor law merely determining the rights and liabilities of individuals.

3. Its validity as a law charged with a public interest.

1. **The Law: Its place in the legal system of Arizona, and its interpretation, operation and effect.**

Section 7 of Article 18 of the Constitution of Arizona provides:

"Section 7. To protect the safety of employees in all hazardous occupations, in mining, smelting, manufacturing, railroad or street railway transportation, or any other industry the legislature shall enact an Employers' Liability Law, by the terms of which any employer, whether individual, association, or corporation, shall be liable for the death or injury, caused by any accident due to a condition or conditions of such occupation, of any employee in the service of such employer in such hazardous occupa-



tion, in all cases in which such death or injury of such employee shall not have been caused by the negligence of the employee killed or injured."

Pursuant to this mandate the legislature enacted what is now chapter 6 of title 14 of the Revised Statutes of 1913, which reads, in full, as follows:

#### "CHAPTER VI.

#### "LIABILITY OF EMPLOYERS FOR INJURIES TO WORKMEN IN DANGEROUS OCCUPATIONS.

"3153. This chapter is and shall be declared to be an employers' liability law as prescribed in section 7 of article XVIII of the State Constitution.

"3154. That to protect the safety of employees in all hazardous occupations in mining, smelting, manufacturing, railroad, or street railway transportation, or any other industry, as provided in said section 7 of article XVIII of the State Constitution, any employer, whether individual, association, or corporation, shall be liable for the death or injury, caused by any accident due to a condition or conditions of such occupation, of any employee in the service of such employer in such hazardous occupation, in all cases in which such death or injury of such employee shall not have been caused by the negligence of the employee killed or injured.

"3155. The labor and services of workmen at manual and mechanical labor, in the employment of any person, firm, association, company, or corporation, in the occupations enumerated in the next section hereof, are hereby declared and determined to be service in a hazardous occupation within the meaning of the terms of the preceding section.

"By reason of the nature and conditions of, and the means used and provided for doing the work in, said occupations, such service is especially dangerous and hazardous to the workmen therein, because of risks and hazards which are inherent in such occupations and which are unavoidable by the workmen therein.

"3156. The occupations hereby declared and determined to be hazardous within the meaning of this chapter are as follows:

"(1.) The operation of steam railroads, electrical railroads, street railroads, by locomotives, engines, trains, motors, or cars of any kind propelled by steam, electricity, cable or other mechanical power, including the construction, use or repair of machinery, plants, tracks, switches, bridges, roadbeds, upon, over and by which such railway business is operated.

"(2.) All work when making, using or necessitating dangerous proximity to gunpowder, blasting powder, dynamite, compressed air, or any other explosive.

"(3.) The erection or demolition of any bridge, building or structure in which there is, or in which the plans and specifications require, iron or steel frame work.

"(4.) The operation of all elevators, elevating machines or derricks or hoisting apparatus used within or on the outside of any bridge, building or other structure for conveying materials in connection with the erection or demolition of such bridge, building or structure.

"(5.) All work on ladders or scaffolds of any kind elevated twenty feet or more above the ground or floor beneath in the erection, construction, repair, painting or alteration of any building, bridge, structure or other work in which the same are used.

"(6.) All work of construction, operation, alteration or repair where wires, cables, switchboards, or other apparatus or machinery are in use charged with electrical current.

"(7.) All work in the construction, alteration, or repair of pole lines for telegraph, telephone or other purposes.

"(8.) All work in or about quarries, open pits, open cuts, mines, ore reduction works and smelters.

"(9.) All work in the construction and repair of tunnels, subways and viaducts.

"(10.) All work in mills, shops, works, yards, plants and factories where steam, electricity, or any

other mechanical power is used to operate machinery and appliances in and about such premises.

"3157. Every employer, whether individual, firm, association, company or corporation, employing workmen in such occupation, of itself or through an agent, shall by rules, regulations or instructions, inform all employees in such occupations as to the duties and restrictions of their employment, to the end of protecting the safety of employees in such employment.

"3158. When in the course of work in any of the employments or occupations enumerated in the preceding section, personal injury or death by any accident arising out of and in the course of such labor, service and employment, and due to a condition or conditions of such occupation or employment, is caused to or suffered by any workman engaged therein, in all cases in which such injury or death of such employee shall not have been caused by the negligence of the employee killed or injured, then the employer of such employee shall be liable in damages to the employee injured, or, in case death ensues, to the personal representative of the deceased for the benefit of the surviving widow or husband and children of such employee; and, if none, then to such employee's parents; and, if none, then to the next of kin dependent upon such employee; and, if none, then to his personal representative, for the benefit of the estate of the deceased.

"3159. In all actions hereafter brought against any such employer under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to any employee, or where such injuries have resulted in his death, the question whether the employee may have been guilty of contributory negligence, or has assumed the risk, shall be a question of fact and shall at all times, regardless of the state of the evidence relating thereto, be left to the jury, as provided in section 5 of article XVIII of the State Constitution; provided, however, that in all actions brought against any employer, under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death,

the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee.

"3160. That any contract, rule, regulation or device whatsoever, the purpose or intent of which shall be to enable any employer to exempt himself or itself from any liability created by this chapter, shall to that extent be void; provided, that in any action brought against any such employer under or by virtue of any of the provisions of this chapter, such employer may set off therein any sum it has contributed or paid to any insurance, relief, benefit, or indemnity or that it may have paid to the injured employee or his personal representative on account of the injury or death for which said action was brought.

"3161. In all actions for damages brought under the provisions of this chapter, if the plaintiff be successful in obtaining judgment, and if the defendant appeals to a higher court, and if the plaintiff in the lower court be again successful; and the judgment of the lower court is sustained by the higher court or courts; then, and in that event the plaintiff shall have added to the amount of such judgment by such higher court or courts, interest at the rate of twelve per cent per annum on the amount of such judgment from the date of the filing of the suit in the first instance until the full amount of such judgment is paid.

"3162. No action shall be maintained under this chapter unless commenced within two years from the day the cause of action accrued."

Article 18 of the Arizona Constitution, entitled "Labor," contains a comprehensive program. Section 1 creates an eight-hour day in all public employment; section 2 prohibits the employment of minors of certain ages in enumerated occupations and limits their hours of labor; section 3 invalidates contracts discharging employers from liability for injuries due to their negligence; section 4 abrogates the

fellow-servant doctrine; section 5 declares that "the defense of contributory negligence or of assumption of risk shall in all cases whatsoever be a question of fact, and shall at all times be left to the jury;" section 6 provides: "The right of action to recover damages for injuries shall never be abrogated, and the amount recovered shall not be subject to any statutory limitation;" section 7, as is above quoted, calls for the enactment of the liability law in question in this case; section 8 commands the legislature to enact a Workmen's Compulsory Compensation Law, and reads as follows:

"Section 8. The legislature shall enact a Workmen's Compulsory Compensation Law applicable to workmen engaged in manual or mechanical labor in such employments as the legislature may determine to be especially dangerous, by which compulsory compensation shall be required to be paid to any such workman by his employer, if in the course of such employment personal injury to any such workman from any accident arising out of, and in the course of, such employment is caused in whole, or in part, or is contributed to, by a necessary risk or danger of such employment, or a necessary risk or danger inherent in the nature thereof, or by failure of such employer, or any of his or its officers, agents or employee, or employees, to exercise due care, or to comply with any rule affecting such employment; Provided, that it shall be optional with said employee to settle for such compensation, or retain the right to sue said employer as provided by this constitution."

Section 9 forbids the exchange, solicitation or giving out of any labor blacklist; and section 10 limits employment on public works to citizens or those who have declared their intention to become citizens, and permits employment of prisoners on such work.

The legislature in 1912 enacted a Workmen's Compulsory Compensation Act under the mandate contained in section 8 of the article of the Constitution on Labor, and this

law is still in force. The legislature also re-enacted the law which had existed in territorial days, giving an action for death by wrongful act (Title 23, Revised Statutes of 1913).

Thus, in Arizona, one who has suffered personal injury in the employments listed in the Liability Law—which are substantially identical with those covered by the Compensation Act—may have a possible choice of three remedies: First, an action for negligence as at common law, with the common-law defenses modified by the Constitution; second, an action under the Liability Law; and, third, a demand for compensation under the Compensation Act, with a suit to enforce payment of compensation if it is refused, as provided in the Compensation Act. *Consolidated Arizona Smelting Co. vs. Ujack*, 15 Ariz., 382, 384; 139 Pac., 465, 466.

In case death ensues, suit may be brought under title 23 of the Revised Statutes of 1913, if it be due to wrongful act, and under the Liability Law if no negligence is present.

It is apparent from a consideration of the article on labor that the framers of the Constitution intended: First, to preserve and perfect the employee's common-law right of action for negligence; second, to supplement that right by the creation of a new right of action for non-negligent injuries; and, third, to confer upon employees a right to compensation for all injuries, both negligent and non-negligent, and thus doubly cover the entire field.

In conformity with this constitutional scheme, the legislature, by means of the Liability Law, subsequently enacted, created a liability for non-negligent injuries. In the present case the Supreme Court of Arizona said:

"The appellant contends, and I think his contention is correct, that the liability statute must be construed as one creating a liability for accidents resulting in injuries to the workmen engaged in hazardous occupations due to the risks and hazards inherent in such occupations, without regard to the negligence of the employer, as such negligence is understood in the

common law of liability; in other words, such statute creates a liability for accident arising from the risks and hazards inherent in the occupation without regard to the negligence or fault of the employer. The cause was tried upon that theory, and the judgment must stand or fall according to the validity or invalidity of the said statute."

Inspiration · Con. Cop. Co. *vs.* Mendez, 166 Pac., 278, at 281.

In Arizona Copper Co. *vs.* Burciaga, 177 Pac., 29, at 31, in a decision handed down on December 21, 1918, the Supreme Court of Arizona said:

"As clearly intimated by this court in Inspiration Consolidated Copper Co. *vs.* Mendez, 19 Ariz., —; 166 Pac., 278, 1183, the Employers' Liability Law is designed to give a right of action to the employee injured by accident occurring from risks and hazards inherent in the occupation and without regard to the negligence on the part of the employer. Such is the clear import of the said Employers' Liability Law. Whether the employee's negligence becomes an element in actions based upon such statute depends upon whether the defendant injects into the cause such questions by means of setting up negligence on the part of the plaintiff as contributing to plaintiff's injuries as a partial defense, or the negligence of the employee as the sole proximate, efficient cause of the injury.

"In all other cases the question as to whether the defendant is guilty of negligence which proximately caused the accident and resulting injuries to the plaintiff is wholly beyond the questions involved and immaterial to the inquiry. The cause of the action and the right of recovery granted by chapter 6, tit. 14, Employers' Liability Law, exists without regard to negligence on the part of the defendant employer. If the injured workman relies for recovery upon the negligence of the employer as a cause for action, he must pursue the common-law remedy, as he is given no remedy to recover for negligence by the Employers' Liability Law. That statute takes no cognizance of negligence as an element in the right of

action given, and the presence in or absence of negligence from the accident relied upon for recovery under the statute adds nothing to or takes nothing from the rights of the parties, except as above noted."

This liability for non-negligent injuries is to be enforced by a civil action, tried before a court and jury, in which the only issues presentable are the issues of employment, of the happening of the alleged accident, and the question whether it was due to the condition or conditions of the employment or to the negligence of the plaintiff. The questions of assumptions of risk and contributory negligence, though specifically referred to in the law as defenses, are denied to the defendant for all practical purposes. *Inspiration Con. Cop. Co. vs. Mendez*, 166 Pac., 278, at 284. In fact the Supreme Court of Arizona, in *Superior & Pittsburg Copper Co. vs. Tomich*, 165 Pac., 1101, at 1104, says that the defendant cannot plead contributory negligence without thereby conclusively admitting that he was himself guilty of negligence. To the same effect see *Arizona Copper Co. vs. Burciaga*, 177 Pac., 29, at 31; *Calumet & Arizona Mining Co. vs. Chambers*, 176 Pac., 839, 842. If this intimation is sound, there would be injected by the implied admission of the defendant an issue entirely foreign to the controversy. Obviously the intimation is unsound. It proceeds from the definition of contributory negligence sometimes given in negligence cases as being such negligence on the plaintiff's part as in concurrence with the defendant's negligence contributes to the injury. Granting the correctness of this definition of contributory negligence in its common-law significance, in common-law cases, the term cannot have such meaning when used in a statute confined to liability for non-negligent injuries. In such a law, if it means anything, it can only mean negligence of the plaintiff, which while not the sole cause of the accident, nevertheless does contribute with the unavoidable risks of the work, which constitute the conditions of the employment, to bring about the injury.



Plaintiff's negligence may contribute with such risks in a liability law case quite as readily as it may concur with a defendant's negligence in a negligence case, and in neither instance should defendant's allegation of contributory negligence be deemed an admission that the force or factor with which plaintiff's negligence contributed was one for which the defendant would be liable. Aside, however, from this anomaly, in the interpretation of the law by the Arizona Supreme Court the defenses of assumption of risk and contributory negligence are substantially non-existent. Perhaps these defenses are inconsistent with the liability created and should not be available. In fact, there is practically no defense available. As Justice Ross says, in his dissenting opinion in the Mendez case, 166 Pac., 1183, at 1184:

"It contemplates a trial by jury, whose only functions, necessarily in most cases, must be the fixing by their verdict the sum to be paid by the employer."  
116 Pac., 1183, at 1184.

The award in such cases is called "damages." The measure of such damages is not prescribed in terms. The courts, however, apply in actions under this law the same measure of damages as is applied in common-law actions for tort. As Justice Ross states in his dissenting opinion, 166 Pac., 1183, at 1184:

"The legislature designates the recompense for injury or death under the Employers' Liability Act as 'damages for personal injuries', evidently intending thereby that the damages recovered should be ascertained and measured by the common-law standard or by the rules governing in actions sounding in tort."

In *Arizona Copper Co. vs. Barciaga*, 177 Pac., 29, at 33, in an opinion not participated in by Justice Ross, the Supreme Court uses this language:

"Hence the language 'liable in damages,' as used in paragraph 3158, c. 6 of title 14, Employers' Liability Law, Rev. Stat. of Ariz., 1913, has reference to

and means that the employer becomes obligated to pay to the employee injured in an accident while engaged in an occupation declared hazardous, occurring without fault of the employer, all loss to the employee which is actually caused by the accident and the amount of which is susceptible of ascertainment. All idea of speculative, exemplary, and punitive damages are excluded from the meaning evidently intended to be conveyed by the expression used.

"Of course, mental and physical suffering experienced by the employee injured, proximately resulting from the accident, the reasonable value of working time lost by the employee, necessary expenditures for the treatment of injuries and compensation for the employee's diminished earning power directly resulting from the injury, and perhaps other results causing direct loss, are matters of actual loss and as such recoverable."

See also *Calumet & Arizona Mining Co. vs. Chambers*, 176 Pac., 839, 842.

It thus appears that the measure of damages in common-law actions applies with the elimination only of punitive damages. In other words, in an action for injuries not due to negligence, damages are awarded for pain, suffering and disfigurement in addition to loss of time and impaired earning capacity. The amount of the award is "unlimited and unlimitable." *Inspiration Con. Cop. Co. vs. Mendez*, 166 Pac., 278, at 284 and 1188. In practice, the awards are excessively large. Ross, Justice, dissenting, *Superior & Pittsburg Copper Co. vs. Tomich*, 165 Pac., 1185, at 1186. See award in *Superior & Pittsburg Cop. Co. vs. Davidovich*, 171 Pac., 127.

This law is in no sense a regulation of dangerous employments. The declared purpose "to protect the safety of employees" constitutes a false label for the law which follows. The provisions of paragraph 3157, relative to rules, regulations and instructions, effect no extension of the common-law duty which rests upon employers to adopt rules and to warn

and instruct employees where the circumstances require it. No new duty is imposed upon the employer and he is subjected to no liability for failure to discharge his duties, new or old. The liability is for inevitable accidents. The law merely imposes pecuniary liability for injuries that cannot be foreseen or prevented by any degree of care. The imposition upon the employer of pecuniary liability may mitigate the situation of the injured employee, but it cannot increase the care of the employer or protect the employee from injury. As Justice Pitney said in *Coppage vs. Kansas*, 236 U. S., 1, at page 15:

“\* \* \* When a party appeals to this court for the protection of rights secured to him by the Federal Constitution, the decision is not to depend upon the form of the State law, nor upon its declared purpose, but rather upon its operation and effect as applied and enforced by the State; and upon these matters this court cannot, in the proper performance of its duty, yield its judgment to that of the State court.”

Speaking of the statute involved in the Passenger Cases, 7 How., 283, 458, Justice Grier said: “Its true character cannot be changed by its collocation.” Speaking of the law in question here, Justice Ross said:

“There is not much in the name. The true test of what the right of action is, or was intended to be, must, in this case as in all others, be ascertained from the words used to describe and define it.”

166 Pac., at 1184.

Judging the true character of this law by the words used to define the liability and by its operation and effect as applied and enforced by the courts of the State, it merely seeks to impose a new liability on employers. Such appears to be its sole purpose, as it is its sole accomplishment. It is devoid of all of the features that characterize measures which seek to attain social justice by regulating in the interest of the public

the private relation of master and servant out of which loss from industrial accidents are bound to arise.

Our conclusion is that this is merely a labor law confined to the rights and liability of the employee and employer and not a police measure in which the public has an interest. Consequently the question of its validity should be determined by the principles which govern laws affecting private rights as distinguished from those by which police measures enacted primarily to safeguard the public are to be tested.

## 2. The validity of the law as a labor law merely determining the rights and liabilities of individuals.

So long ago as 1810 this court, in the much-cited case of *Fletcher vs. Peck*, 6 Cranch, 87, at 135, declared that the "nature of society and of government" prescribes "some limits to the legislative power," and in accordance with that declaration the court concluded (p. 139) that the State of Georgia "was restrained *either by general principles which are common to our free institutions* or by the particular provisions of the Constitution of the United States" from impairing the patent title to land in the hands of an innocent purchaser for value. 6 Cranch, 139. In *Chicago, B. & Q. R. Co. vs. Chicago*, 166 U. S., 226, at 237, Mr. Justice Harlan quoted with approval the language of Chief Justice Marshall in *Fletcher vs. Peck*, and further quoted Mr. Justice Miller's observations in *Citizens Saving & Loan Association vs. Topeka*, 20 Wallace, 663, 665, as to the powers of the three branches of government:

"There are limitations of such power which grow out of the essential nature of all free governments—implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name."

In *Holden vs. Hardy*, 169 U. S., 366, at 389, Mr. Justice Brown said:

"It is sufficient to say that there are certain immutable principles of justice which inhere in the very idea of free government, which no member of the Union may disregard, as that no man shall be condemned in his person or property without due notice and an opportunity of being heard in his defense."

In *New York Central R. R. Co. vs. White*, 243 U. S., 188, at 202, speaking of the New York Compensation Act under review, Mr. Justice Pitney said:

"Of course we cannot ignore the question whether the new arrangement is arbitrary and unreasonable from the standpoint of natural justice."

The foregoing utterances are sufficient to demonstrate that this court, throughout its career, has recognized how firmly the fabric of free government rests upon the inviolability of private right. The preservation of individual liberty and the protection of private property and of the right of private contract are essential to all free government.

From the fact that private right must be subordinated to the public welfare, it does not follow that in those cases where the public welfare does not require the surrender of private right the legislature, merely as between individuals, may make arbitrary distribution of private losses. As this court said in *Lochner vs. New York*, 198 U. S., 45, at 56:

"It must, of course, be conceded that there is a limit to the valid exercise of the police power by the State. There is no dispute concerning this general proposition. Otherwise the 14th Amendment would have no efficacy and the legislatures of the States would have unbounded power, and it would be enough to say that any piece of legislation was enacted to conserve the morals, the health, or the safety of the people; such legislation would be valid, no matter how absolutely without foundation the claim might be. The claim of the police power would be a mere pretext,—become

another and delusive name for the supreme sovereignty of the State to be exercised free from constitutional restraint."

Again:

*"The question whether this act is valid as a labor law, pure and simple, may be dismissed in a few words. There is no reasonable ground for interfering with the liberty of person or the right of free contract, by determining the hours of labor, in the occupation of a baker. There is no contention that bakers as a class are not equal in intelligence and capacity to men in other trades or manual occupations, or that they are not able to assert their rights and care for themselves without the protecting arm of the State, interfering with their independence of judgment and of action. They are in no sense wards of the State. Viewed in the light of a purely labor law, with no reference whatever to the question of health, we think that a law like the one before us involves neither the safety, the morals, nor the welfare, of the public, and that the interest of the public is not in the slightest degree affected by such an act."* (Italics ours.)

In the case of a mere labor law the slightest exaction would be beyond the legislative power, for, as this court said in *Mountain Timber Co. vs. Washington*, 243 U. S., 219, at 240, speaking of the imposition of a tax by the Washington law: "If not warranted by any just occasion, the least imposition is oppressive."

The law of negligence is founded upon reason. Under the law of the jungle, that might makes right, the strong and powerful oppressed and despoiled the weak at will. The first contribution of civilization was the placing of reasonable restraint upon the unlimited power of the strong. Gradually the law of obligation supplanted the old savage law of non-liability. It is reasonable that an individual should refrain from causing injury to another by his negligence, and that he should make recompense for injury so caused, but it is self-

evident that the establishment of a rule of unlimited liability without fault as the governing rule of individual responsibility would merely substitute for the old natural law of non-liability a new tyranny of irresponsible and arbitrary power. This is precisely what the Arizona law attempts to do.

The obligation of the individual to respond in damages for negligence and his right to immunity from liability when not at fault are thus among those obligations and rights that inhere in free government. It is because of their fundamental character that they have persisted throughout our legal history. Changes have been made from time to time in the administration of the law of negligence, as in the defenses available to relieve one charged with negligence, and in the extent of the duties assumed or imposed, the breach of which shall constitute negligence, and in the rules of evidence in such cases, but the individualistic basis of liability for personal injury, and its converse of immunity from responsibility in the absence of negligence, as rules of individual liability, have remained unchanged in their broad outlines.

Nothing inherent in free government or natural justice requires that one charged with negligence should be allowed to urge the defenses of assumption of risk, contributory negligence or fellow-servant, or that the conception of duties, the breach of which constitute negligence, should not develop with the unfolding industrial life of the people. Therefore, as this court has repeatedly declared, these defenses may be modified or entirely abrogated and new duties may be created.

New York Central R. R. Co. *vs.* White, 243 U. S., 188, 198, and following.

Mondou *vs.* New York, New Haven & H. R. Co., 223 U. S., 1, 51.

Munn *vs.* Illinois, 94 U. S., 113, 134.

The distinction is both clear and fundamental between the proposition that, regardless of these defenses, an employer shall be liable in damages for his negligence, either personal

or properly imputed to him, and the further proposition that he shall be liable as for negligence when he is in no sense at fault. Under the first proposition the question of negligence still remains, and on this fundamental question the defendant has the right to defend. Under the second proposition, liability is practically prejudged. If the right to defend cannot thus be taken away indirectly by a conclusive presumption of negligence (*Mobile, Jackson & K. C. R. Co. vs. Turnipseed*, 219 U. S., 35, at 43), it cannot be taken away directly by a departure from the principle of negligence as the basis of individual liability for injury.

As the Supreme Court of Texas said, in the recent case of *Middleton vs. Texas Power & Light Company*, 185 S. W., 556, at 559, in upholding the optional compensation law of that State:

"A legislature may in proper instances prescribe duties and penalize their breach through an authorization for the recovery of consequent damages. But it is wholly without any power to deny the citizen the right of making any defense when sued in courts. There is no such thing in this country as taking one man's property without his consent and giving it to another by legislative edict. That is nothing less than confiscation by legislative decree. If this act, therefore, had declared an employer not consenting to its provisions absolutely liable to damages at the suit of an employee for any injuries sustained by the latter in the employment, without reference to any wrong or breach of duty committed by the employer, it would have been void. Such a law would have amounted to a legislature forfeiture of property rights, regardless of the holding of any court upon the question."

There are certain instances of liability which are sometimes cited as examples of liability without fault. Thus, in *Chicago, Rock Island & Pacific R. R. Co. vs. Zerneck*, 183 U. S., 582, at 586:

"Our jurisprudence affords examples of legal liability without fault and the deprivation of property with-



out fault being attributable to its owner. The law of deodands was such an example; the personification of the ship in admiralty law is another. Other examples are afforded in the liability of the husband for the torts of his wife, the liability of a master for the acts of his servant."

And in *New York Central Ry. Co. vs. White*, 243 U. S., 188, at 204:

"Much emphasis is laid upon the criticism that the act creates liability without fault. This is sufficiently answered by what has been said, but we may add that liability without fault is not a novelty in the law. The common-law liability of the carrier, of the inn-keeper, or him who employed fire or other dangerous agency or harbored a mischievous animal, was not dependent *altogether* upon questions of fault or negligence. Statutes imposing liability without fault have been sustained. *St. Louis & S. F. R. Co. vs. Mathews*, 165 U. S., 1, 22; 41 L. ed., 611, 619; 17 Sup. Ct. Rep., 243; *Chicago, R. I. & P. R. Co. vs. Zerneck*, 183 U. S., 582, 586; 46 L. ed., 339, 340; 22 Sup. Ct. Rep., 229." (*Italics ours.*)

The instances catalogued in these decisions are apparent departures from the common-law concept of liability for negligence only, but when analyzed they will be found to furnish no substantial basis in reason or in law for the support of legislation such as that presented in this case.

By the ancient law of deodands, the property of a man wholly innocent of wrong was confiscated by the Crown under the false cloak of religion. As we understand the doctrine, the offending chattel was forfeited, even though its victim was the owner of it. One of the chief sources of our pride in our English and American institutions today is that all such ancient tyrannies, both civil and religious, have long since passed away forever.

The other instances cited are apparent rather than real exceptions to the rule of non-liability in the absence of fault.

In admiralty, the ship itself is treated as a wrongdoer, but

is only answerable for the wrong of those in charge of her. As Justice Field said, in *Sherlock vs. Alling*, 93 U. S., 99, at 108:

"By the maritime law the vessel as well as the owners is liable to the party injured *for damages caused by its torts*. By that law the vessel is deemed to be an offending thing and may be prosecuted without any reference to the adjustment of responsibility between the owners and employees *for the negligence which resulted in the injury.*" (Italics ours.)

The same doctrine is clearly expressed by the United States District Court in *The Ville de St. Nazaire*, 124 Fed., 1008, as follows:

"The distinguishing feature of proceedings *in rem* is that the vessel or thing proceeded against is impleaded as a real defendant. In a case for damages such as this, *some fault or negligence on the part of those in control must be computed to the ship in order to charge it with liability.*" (Italics ours.)

The husband's liability for the torts of the wife arose at a time when the wife had no separate estate, and, in fact, no separate legal existence, and when, in law, the "two spouses were one person, and the husband that one." The master exercised over the servant in the course of his employment (and his liability was limited to acts of the servant within the scope of his employment) a real control, such as, in theory at least, the husband exercised over his wife. The maxim of agency "*qui facit per alium facit per se*," which is the real foundation of the husband's liability as well as that of the master, involves imputed fault in cases where the relation of the parties furnishes some foundation in justice for the imposition of liability. The fault is there, but it may not be the personal fault of the person charged with responsibility for it.

The common-law liability of the carrier and of the innkeeper, of course, did not arise out of a mere personal rela-

tion. Both carriers and inn-keepers pursue a public calling, one charged with a public interest, and therefore peculiarly subject to regulation in the interest of the public. They must alike serve the public without discrimination, and the public must patronize them. It was never the law, so far as we know, that private carriers or private boarding-house keepers, who are free to serve whom they will, under such contracts as they may please to make, were liable as insurers to their patrons or guests.

The liability of one who employed fire or other dangerous agency or harbored a mischievous animal may be liability of an exceptional nature. Without actual negligence on the part of the defendant, however, damages rarely occur to others from these agencies. In the few cases where, despite the exercise of all possible care, injuries to others inevitably occur, there is some color for the claim that the agency is so dangerous to those having no interest in it and no control over it that its very maintenance is a nuisance and a public wrong. Whether this be so or not, the analogy between the responsibility for such agencies and liability for inevitable accidents in industry as between the joint adventurers pursuing such industry for their mutual profit is so remote as to furnish no real aid in the solution of the present problem. It appears, however, that the common-law obligation of the user of fire to keep it safe did not extend to those cases where its spread was caused "*by a violent tempest or other inevitable accident which he could not have foreseen.*" (Italics ours.) *St. Louis & S. F. R. Co. vs. Mathews*, 165 U. S., 1, at 6. Thus, at least as regards fire, whatever the rule may have been with reference to other agencies, there was no liability in the entire absence of fault.

The liability imposed on common carriers by the Nebraska law, which was upheld in the *Zernecke* case, is an extension to passengers of the liability imposed for freight on such carriers at common law, and rests on the same foundation. It is an insurer's obligation, imposed by the sovereign from which the carrier received its charter and its peculiar rights

and privileges. The power that confers the right to exist may impose such conditions as it chooses. This, in fact, is one of the grounds on which the decision in the *Zernecke* case was expressly rested, and is one on which it may safely rest. A second safe ground may be suggested, namely: the contractual obligation of all common carriers to their passengers to carry them safely. In the *Nitroglycerin Cases*, 82 U. S., 524, 537, 538; 21 L. ed., 206, 211, Justice Field said:

"The gist of the action is the negligence of the defendants; unless that be established they are not liable. The mere fact that injury has been caused is not sufficient to hold them. No one is responsible for injuries from unavoidable accidents while engaged in a lawful business."

Again:

"The cases between passengers and carriers for injuries stand upon a different footing. The contract of the carrier being to carry safely, the proof of the injury usually establishes a *prima facie* case, which the carrier must overcome. His contract is shown, *prima facie* at least, to have been violated by the injury."

If the liability created by the Nebraska statute is a liability without fault, it is thus sustainable on two unimpeachable grounds: The undoubted power of the sovereign to impose restrictions upon a creature of its bounty, when that creature is a common carrier engaged in a business charged with a public interest, and the carrier's responsibility for the breach of its contract of safe carriage.

In passing, it is noteworthy in this connection that neither the Nebraska legislature nor the legislature of any other State or government has ever attempted to impose a similar liability, even upon common carriers, for injuries to their employees.

The liability created by the Missouri statute involved in the case of *St. Louis & S. F. R. Co. vs. Mathews*, 165 U. S., 1,

arose in connection with police regulation of common carriers. The wide distinction between the subject-matter of that law and that of the Arizona liability law is made clear by the following excerpt from the opinion of Mr. Justice Gray, 165 U. S., 1, at 26:

"Railroad corporations, in order the better to carry out the public object of their creation, the sure and prompt transportation of passengers and goods, have been authorized by statute to use locomotive engines propelled by steam generated by fires lighted upon those engines. It is within the authority of the legislature to make adequate provision for protecting the property of others against loss or injury by sparks from such engines. The right of the citizen not to have his property burned without compensation is no less to be regarded than the right of the corporation to set it on fire. To require the utmost care and diligence of the railroad corporations in taking precautions against the escape of fire from their engines might not afford sufficient protection to the owners of property in the neighborhood of the railroads. When both parties are equally faultless, the legislature may properly consider it to be just that the duty of insuring private property against loss or injury caused by the use of dangerous instruments should rest upon the railroad company which employs the instruments and creates the peril for its own profit rather than upon the owner of the property, *who has no control over or interest in those instruments.*" (Italics ours.)

The land owner has no interest in the railroad and no voice in the selection of its route. Its tracks are laid across his farm without his consent, against his will and over his protest. The employee, on the other hand, is equally responsible for the employment out of which inevitable accidents occur and he participates therein for his profit. *New York Central R. Co. vs. White*, 243 U. S., 188, at 205.

In connection with examples of liability without fault might be mentioned the statutes requiring railroad companies to fence their rights of way and upon their failure to

do so imposing upon them liability for stock killed. Such statutes have been upheld.

*Missouri Pacific Ry. Co. vs. Humes*, 115 U. S., 512.

*Minneapolis & St. L. Ry. Co. vs. Beckwith*, 129 U. S., 26.

In such cases the liability is for breach of duty validly imposed (*Gulf, Colorado & S. F. Ry. Co. vs. Ellis*, 165 U. S., 150, 158); in short, a liability for negligence. Black, in his work on Constitutional Law, 2nd ed., p. 351, speaking of similar laws, says:

"But even such statutes cannot go beyond the imposition of such a penalty in cases where the fault lies at the door of the company. If the law attempts to make such companies liable for accidents which were not caused by negligence or disobedience of the law, but by the negligence of others or by uncontrollable causes, or does not give the company an opportunity to show these facts in its own defense, it is void."

Laws imposing liability for stock killed without requiring the right of way to be fenced, on the other hand, create a liability without fault. Such laws have been universally condemned.

*Jensen vs. Union Pac. Ry. Co.*, 6 Utah, 253; 21 Pac., 994.

*Ziegler vs. S. & N. Alabama Ry. Co.*, 58 Alabama, 594.

*Birmingham Ry. Co. vs. Parsons*, 13 So., 602.

*Bielingbery vs. Montana Union Ry. Co. (Mont.)*, 20 Pac., 314.

*Schenk vs. Union Pac. Ry. Co. (Wyo.)*, 40 Pac., 840.

*Catril vs. Union Pac. Ry. Co. (Idaho)*, 21 Pac., 416.

*Denver & R. G. R. Co. vs. Thompson (Colo.)*, 54 Pac., 402.

It is indeed significant that in the whole legal history of individual liability there has been such a consistent aversion

to the establishment of a liability without fault. It cannot be accounted for upon any other theory than that the principle itself is repugnant to the fundamental rights of liberty and property on which our institutions are founded. This rule of individual liability is one of the rules which the legislature is "prevented by constitutional limitations" from changing at its whim. *Munn vs. Illinois*, 94 U. S., at 1388.

It seems plain, therefore, that this law is a mere labor law, concerned only with the rights of individuals, and that as such it is clearly void.

The Arizona court, however, has sustained the measure upon the ground that it is a valid police enactment.

*Inspiration Con. Cop. Co. vs. Mendez*, 166 Pac., 278.

*Superior & Pittsburg Copper Co. vs. Tomich*, 165 Pac., 1188.

*Superior & Pittsburg Copper Co. vs. Davidovich*, 171 Pac., 127, 128.

*Arizona Copper Co. vs. Burciaga*, 177 Pac., 29.

*Calumet & Arizona Mining Co. vs. Chambers*, 176 Pac., 839.

The question remains, therefore, as to the correctness of this ruling.

### **3. The validity of the law as a law charged with a public interest.**

The police power of the State is not without limitation. The bounds of its proper exercise are thus laid down by this court in *Lawton vs. Steele*, 152 U. S., 133, at 137:

"To justify the State in thus interposing its authority in behalf of the public, it must appear first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and second, that the means are reasonably necessary for the accomplishment of the purpose and not unduly oppressive upon individuals. The legislature

may never, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual or unnecessary restrictions upon lawful occupations. In other words, its definition as to what is a proper exercise of police powers is not final or conclusive, but is subject to the supervision of the courts."

When a law challenged under the Fourteenth Amendment is supported as a police measure, a two-fold judicial question arises. The first inquiry is whether the law deals with a subject-matter of public as distinguished from private concern; the second is whether the measure is reasonably necessary and appropriate to achieve the public end sought.

As Mr. Justice Pitney said in *Mountain Timber Co. vs. Washington*, 243 U. S., 219, at 238:

"In the present case it will be proper to consider: (1) Whether the main object of the legislation is, or reasonably may be deemed to be, of general and public moment, rather than of private and particular interest, so as to furnish a just occasion for such interference with personal liberty and the right of acquiring property as necessarily must result from carrying it into effect. (2) Whether the charges imposed upon employers are reasonable in amount, or, on the other hand, so burdensome as to be manifestly oppressive."

In *New York Central R. Co. vs. White*, 243 U. S., 188, at 207, Mr. Justice Pitney said:

"One of the grounds of its concern with the continued life and earning power of the individual is its interest in the prevention of pauperism, with its concomitants of vice and crime. And, in our opinion, laws *regulating* the responsibility of employers for the injury or death of employees, arising out of the employment, bear so close a relation to the protection of the lives and safety of those concerned that they properly may be regarded as coming within the



category of police regulations. *Sherlock vs. Alling*, 93 U. S., 99, 103; 23 L. ed., 819, 820; *Missouri P. R. Co. vs. Castle*, 224 U. S., 541, 545; 56 L. ed., 875, 879; 32 Sup. Ct. Rep., 606." (*Italics ours.*)

The Arizona statute clearly deals with "the responsibility of employers for the injury or death of employees arising out of the employment." We apprehend, however, that not every law that deals with a proper subject-matter of police regulation is to be construed as a police measure or is to be held valid as such. In *Lochner vs. New York*, 198 U. S., 45, at 57, Mr. Justice Peckham said:

"The mere assertion that the subject relates, though but in a remote degree, to the public health, does not necessarily render the enactment valid. The act must have a more direct relation, as a means to an end, and the end itself must be appropriate and legitimate, before an act can be held to be valid which interferes with the general right of an individual to be free in his person and in his power to contract in relation to his own labor."

The compensation systems considered by this court in *New York Central R. Co. vs. White* and the companion cases of *Hawkins vs. Bleakly*, 243 U. S., 210, and *Mountain Timber Co. vs. Washington*, 243 U. S., 219, *regulate* in a most thorough-going manner and in the interest of the public the whole subject-matter of compensation for industrial injury and death. The Arizona law has nothing in common with these laws. It does not *regulate* anything. As aptly remarked by Justice Ross in his dissent in this case: "Ours is not a system but a lawsuit." In dealing with the comprehensive New York Compensation Law, in the *White* case, Mr. Justice Pitney said:

"And we recognize that the legislation under review does measurably limit the freedom of employer and employee to agree respecting the terms of em-

ployment, and that it cannot be supported except on the ground that it is a reasonable exercise of the police power of the State." (Italics ours.)

New York Central R. Co. *vs.* White, 243 U. S., 188, at 206.

It seems to us that the Arizona law is in no sense a police measure. However, if we treat it as such simply because it deals with a subject which may be *regulated* in the interest of the public, it follows from what the court has said that it must be set aside as invalid unless it can be supported as an appropriate and proper exercise of the police power.

In order to judge of the appropriateness and the propriety, as well as the reasonableness of a police measure, it is necessary to know the specific public need which it is designed to meet or the precise public interest to be protected by it. The extent of the public interest must mark the extreme limit of permissible interference with the private rights of the parties.

The regulation of the relation of master and servant and of the compensation to be paid the servant in case of injury are conceivably matters of public concern, for the reason that if the burden of injury losses is to fall on the workman, the injured man and his dependents are certain, in a considerable number of instances, to be pauperized and to be driven into vice and crime. New York Central R. Co. *vs.* White, 243 U. S., 188, at 207. The public interest is two-fold. The public is concerned, in the first place, with the method by which compensation is secured, to the end that it shall be fairly estimated and promptly paid in all cases, without burdensome expenses and under such circumstances as to minimize friction between employer and employee. In the second place, the public is concerned with the amount of compensation so that the award shall be sufficient to protect the workman and his dependents against poverty and its attendant evils. This two-fold interest of the public must find appropriate expression in any law which can be sustained as a police regulation.

The matter of method becomes of public concern because of the collapse of the former system of liability. The common law of negligence furnishes no remedy in the cases of non-negligent injury, which are rapidly increasing in number annually, and from which results follow to those injured and the public which are quite as serious as in negligence cases. *New York Central R. Co. vs. White, supra*, at 205. *New York Central R. Co. vs. Winfield*, 244 U. S., 147, at 164, 165. Within its peculiar field the common law has broken down. Its administration is accompanied by a train of evils, including intolerable delays and burdensome expense for court costs and medical and legal fees, unscientific awards which are oftentimes utterly inadequate or grossly excessive, and much unnecessary bitterness and friction between those who should be friends.

The public, which must ultimately bear the burden of economic loss, is as vitally interested in the system by which compensation is estimated as it is in the scale of compensation. Its first concern is the eradication of the evils of litigation by insuring prompt payment of just compensation in all cases without burdensome expense or unnecessary friction. This can only be achieved by abolishing litigation and establishing a fair and just system of compensation. The prosecution of the lawsuit created by the Arizona law may be beset with fewer difficulties for the plaintiff than a suit for negligence, but it is subject to the same delays and the same expenses, and has the same potentialities for injustice and ill-feeling. Dissenting opinion of Ross, Justice, 163 Pac., 1183. So far as method is concerned, therefore, the common good is in nowise served by such a law.

In the second place, it is a matter of public concern that the award in case of injury or death shall be sufficient to prevent pauperism and its evils. It is of equal concern that the award shall not exceed what is reasonably necessary to protect the workman and his dependents in these respects.

Personal injuries usually involve physical pain and suffering and frequently result in deformity or disfigurement,

which may cause mental depression, anguish or humiliation. The physical hurt must be borne by the injured person; it cannot be shifted. *New York Central R. Co. vs. White*, 243 U. S., 188, at 203. Neither can the physical hurt be measured in terms of money. In the nature of the case, therefore, the public interest cannot extend to the point of requiring compensation for these elements. A law which authorized an award of damages for pain and suffering and kindred elements does not serve the public interest. It does, however, open wide the door for speculative verdicts, which bear no true relation to the public interest or to the pecuniary loss sustained by the injured man.

Neither can there be any suggestion of public concern in saddling upon the industry, or upon a particular employer, an unlimited liability to the estate of a deceased workman who has left no one dependent upon his labors, and therefore no one who has suffered pecuniary loss by his death.

The Arizona law, as shown by the decisions of the State Court already cited, authorizes an award of damages for physical pain and suffering, mental anguish and disfigurement, and by a provision, in no sense separable, subjects the employer in cases of injury resulting in death to liability in damages to the estate when no dependent relatives survive. Par. 3158.

This court, in the compensation cases, has expressly refrained from specifying the legal limits of permissible compensation under compensation laws. Nevertheless, the decisions make it clear that compensation must be based upon earnings, and cannot be allowed for speculative elements such as are included in the damages awarded under the Arizona law. It is equally manifest from these decisions that the rate of compensation must be certain or ascertainable on some definite basis and that it must be limited in amount.

These restrictions follow logically from the court's conception of the compensation system as disregarding the immediate cause of the accident and as treating the employment itself for which employer and employee are jointly responsible as the true cause of the injury. Under such a con-

ception there can be no question of damages, no question of liability, no question of punishment, but only the question of a just and reasonable sharing in the first instance of the loss inevitably flowing from a joint adventure from which both participants derive profit, the ultimate burden of which, reflected in the increased cost of the product, must finally be borne by the public.

The Arizona law is as inconsistent with this conception as is the common law. It relieves the employer of none of the evils of the common law, but saddles upon him a new lawsuit for damages according to common-law standards, where he has exercised the utmost human care, and, in addition, penalizes him 12 per cent of the jury's award if he fails on appeal.

It is our deliberate judgment that this law possesses none of the attributes of reasonableness that are requisite in a police measure, that it bears no true relation to the public interest, that it provides no just solution of this difficult problem, but that under the guise of the police power it seeks by arbitrary means irreconcilable with natural justice to take away from the employer in a lawful business his property and his rights and leaves him without adequate safeguard or defense. If a law like this can be sustained as fair and reasonable and as appropriate and necessary to protect the public interest, it would be difficult to conceive of lengths to which the legislature could not go.

In conclusion, therefore, we submit that whether this law be considered as a mere labor law confined to the declaration of a new liability between employer and employee, or whether it be viewed as an attempted exercise of governmental power, it must be condemned as unreasonable and arbitrary and contrary to the dictates of natural justice, and for those reasons in violation of the Fourteenth Amendment.

Respectfully submitted,

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# In the Supreme Court of the United States

October Term, 1917

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No. 819

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INSPIRATION CONSOLIDATED COPPER  
COMPANY,

*Plaintiff in Error,*

*vs.*

CEFERINO MENDEZ,

---

IN ERROR TO THE SUPREME COURT OF THE  
STATE OF ARIZONA

---

BRIEF ON BEHALF OF DEFENDANT IN ERROR

---

## STATEMENT

This action was brought in the Superior Court, Gila County, Arizona, to recover damages for personal injuries in which a judgment was entered in favor of the defendant in error, the plaintiff in the trial court for the sum of Five thousand two hundred thirty-



seven and fifty-three one-hundredths (\$5,237.53) Dollars.

An appeal was taken to the Supreme Court of the State of Arizona, and decision rendered and judgment affirmed the 2nd day of July, 1917, (folio 359.) The order of allowance of the writ of error was made November 19th, 1917, (folio 369,) and filed November 24th, 1917, (folio 371.) The action was founded upon the Employer's Liability Act, of the State of Arizona, Chapter VI, Title XIV, of the Revised Statutes of 1913.

The contention of the plaintiff in error is that the act is in violation of the fourteenth amendment of the United States Constitution.

The assignments of error, (folios 365, 366, and 367), of which there are six, set forth that the act in question, was unconstitutional, in that it created unlimited liability without fault, and that it deprived the plaintiff in error of its property without due process of law and denied to it the equal protection of the laws. These objections are all contained in the first assignment. The rest of the assignments are merely repetitions of the first and need not be further considered.

It will be noticed that the assignments are general in character and do not show upon what ground the plaintiff in error will contend that the act did violate the fourteenth amendment, except in that it created unlimited liability without fault. The specification of points to be relied upon, (folio 379), is equally general and indefinite, or even more so than the assignments of error in that the plaintiff in error seems to have abandoned in its specification the contention or claim that

the act was unconstitutional because it created unlimited liability without fault.

It may be assumed from the pleadings and from the arguments and brief of the plaintiff in error in the court below that his contention will be that the act was unconstitutional because of its violating the term of the fourteenth amendment in that:

I. It created unlimited liability without fault.

II. It deprived the defendant and appellant of its property without due process of law, in that it provided for interest upon the judgment from the date of the filing of the complaint, if an appeal were taken, at the rate of twelve (12) per cent per annum;

III. That the employee or plaintiff in the trial court had the option of taking compensation under paragraph seven, Title fourteen, of the Revised Statutes of Arizona of 1913, commonly known as the Workman's Compulsory Compensation Act.

We shall discuss the above points in that order and as all of the assignments of error are a mere repetition of the first, except insofar as showing the plaintiff's in error procedure, pleadings or motions which it took to bring such questions before the trial court and Supreme Court, we shall not discuss such assignments separately.

## ARGUMENT

### I

THE ACT IN QUESTION DOES NOT CREATE

UNLIMITED LIABILITY NOR DOES IT CREATE LIABILITY WITHOUT FAULT NOR IS LIABILITY WITHOUT FAULT AS BETWEEN EMPLOYER AND EMPLOYEE AS CREATED BY SUCH A STATUTE IN VIOLATION OF THE FOURTEENTH AMENDMENT.

Under the laws of the State of Arizona, an injured employee has three methods which he may pursue to obtain damages for personal injuries.

1. He may commence an action under the Employer's Liability Act as the defendant in error did in this case.

2. He may take advantage of the Common Law Liability of his employer and sue him under the Common Law.

3. He may take advantage of the provisions of the Workman's Compensation Act and recover partial damages, that is a fixed sum as set forth in the act, which damages are necessarily very much less than what he has actually sustained.

If he takes advantage of the Employer's Liability Act, in order to recover full damages, he must show that there has not been negligence on his part. (Sec. 3158). The damages which he will recover are his damages as found by a jury which, it must be conclusively presumed, will be his actual damages.

Under the Compensation Act the employer's negligence is not a defense to the action and he may recover half-time pay for the time that he is totally disabled or

in case of his death, his widow or other dependent may recover a similar compensation during widowhood or dependency, but in no event shall either recover more than four thousand (\$4,000.00) dollars.

The last decade has seen a marked change in the statutes of the various states concerning damages to be recovered by an employee for personal injuries received in the course of his employment, and especially in those employment termed hazardous. The most important change and the most important act is the Workman's Compensation Act of New York, which was passed in December, 1913, and repassed again in January of 1914, in order to avoid any question concerning the constitutionality of the act, because of the amendment of the constitution which did not go into effect until January of that year.

The compensation act and the Employer's Liability Act of the State of Arizona, must be construed together to enable the employee to obtain the same or similar remuneration for personal injuries as is or may be obtained by an employee under the Workman's Compensation Act of New York.

The Compensation Act of Arizona is in no sense a compensation act. It's a mere figure of speech to call it such and the only redeeming feature about it is that it gives the employee the right to sue his employer under the liability act.

Under the Compensation Act the employer practically says to the employee; "We will engage in a joint adventure which is hazardous and likely to cause you personal injury. I will provide all the capital, manage

the business, purchase the machinery and equipment, and receive all the profits. You will do all the work for which I will pay you wages. In the event that you are injured, so as to result in your total incapacity to earn wages, I will pay you one half time pay until such time as I shall have paid you four thousand (\$4,000.00) dollars. In the event that you are killed even though I may be guilty of negligence and cause your death, I will pay your wife, or other dependent a like sum, providing, your death results within six months from the time I injure you, but if you linger along for six months from the time of the injury, even though the act was wilful upon my part, I will pay your widow or dependent nothing. Nor will I pay you anything for the loss of a limb, disfigurement of any kind, or other injury, no difference how much damage it may cause you or how much pain and suffering you may sustain, except half-time pay until you are able to return to work. In the event that you should for instance, lose a leg or arm I will be entitled to give you a position as watchman or door-keeper and only pay you such half timepay from the date of the injury until the time you are able to take up again such employment as I may offer you."

The Workman's Compensation Act of New York, must be distinguished from this so-called Compensation Act of Arizona. Under the New York Act an employee who is incapacitated for work for life, receives two thirds of his wages for the rest of his life. And under the insurance provision of that act such sum is guaranteed to him by the state. He does not depend upon the future solvency of his employer nor must he follow his employer to other states to sue him. If he is killed, his widow receives her compensation for the rest of her life or until she re-marries. There is no limitation of four

thousand (\$4,000.00) dollars, or any such sum as provided in our statute.

The injustice of the Arizona Compensation Act if construed as providing an exclusive remedy is apparent. If an employee receiving say, three thousand (\$3,000.00) dollars a year, is killed through the negligence of his employer, his widow under this act would receive but four thousand (\$4,000.00) dollars, a little more than he would earn in one year. If he is totally incapacitated for work he will receive the same sum, not in one payment so that he might invest it, and thus provide for some income for the rest of his life, but as half pay until he shall have received the four thousand (\$4000.00) dollars. Then he must look to charity.

IF THE EMPLOYER'S LIABILITY ACT OF ARIZONA IS DECLARED UNCONSTITUTIONAL ON THE GROUND THAT IT CREATES A LIABILITY ON THE PART OF THE EMPLOYER WITHOUT HIS FAULT THE WORKMAN'S COMPENSATION ACT IS ALSO UNCONSTITUTIONAL AND WOULD LEAVE THE EMPLOYEE WITHOUT REDRESS FOR DAMAGES AND EVEN THOUGH THE COMPENSATION ACT WERE NOT UNCONSTITUTIONAL IT WOULD LEAVE THE EMPLOYEE PRACTICALLY REMEDILESS, AS THE COMPENSATION ACT PASSED SUBSEQUENT TO THE LIABILITY ACT WAS NOT INTENDED TO NOR DOES IT GIVE THE EMPLOYEE REASONABLE DAMAGES, BUT WAS INTENDED TO AND ONLY GIVES HIM SMALL DAMAGES WHEN THE ACT WAS DUE TO HIS SOLE NEGLIGENCE THEREBY PREVENTING RECOVERY UNDER THE LIABILITY ACT.

The Workman's Compensation Act of the State of New York was entirely different. It was intended to and does provide for full compensation in all cases and enjoins liability upon the employers whether the employer was or was not guilty of negligence or fault. It also enjoins upon him the duty of providing for insurance, state or otherwise, so that the employee will be as certain as the laws can possibly provide of receiving his compensation.

The plaintiff in error claims that the Arizona Liability Act provides for unlimited liability. This is not so. The liability is no more unlimited than it is under the compensation act of the state of New York. It is limited by the actual damages to be found by a court and jury, and if the verdict is excessive it may be set aside by the trial court, and if not by the trial court by the Appellate Court.

It is a direct reflection upon the courts of this state and the courts of the United States, to say that wrong and injustice will necessarily result from a trial in them or appeal taken to any of them and that justice may be obtained only by a trial before a legislature for damages before the accident occurred.

The judgment which the employee can obtain is limited to the damage sustained. This is probably the first Act of this nature under which the plaintiff in error has contended that it is unconstitutional because a jury must assess the damages.

So new was the theory that a legislature court fix the damages, or facts from which the damages might be fixed by mere computation, before the accident occurred,

that it was strongly argued and contended by the employers that the New York Act was unconstitutional upon that ground and that the employer was entitled to a trial by jury in all cases. (*New York Central vs. White*, 243 U. S. 188; *Ives vs. South Buffalo Co.*, 201 N. Y. 271; *Jenson vs. Southern Pac. Co.* 215 N. Y. 514;)

The contention that the liability is unlimited is untenable. It is a mere subterfuge.

The Act does not provide for liability without fault. It only provides for liability for full damages sustained when *the employee was without fault*. It's a well known fact that there are few if any accidents which ever occur without the fault of someone. Under this Act the employee, to recover full damages, must show that he was without negligence. It necessarily follows that the employer was guilty of negligence or that some third party was at fault, perhaps a co-employee over whose employment and acts the injured employee had no control. It has long been the law of this land that a third person may recover damages for an injury caused by an employee when the employer himself was not guilty of negligence upon the ground that the employer was taking the profits from the enterprize; that the employee's acts were his acts and that the employee was his agent in doing the act. There is no theory of law which would not justify a legislature in giving an injured employee the same right of action against his employer that a third party injured in the same way might have.

It is not a new theory of our jurisprudence that a person may be liable in damages without any fault upon his part.



In the case of *New York Central vs. White*, (supra) this court held the Compensation Act of New York constitutional, which provided for just such liability even though the negligence of the employee himself may have been the sole cause of the accident.

Mr. Justice Pitney in the *White* case at page 198, says, "No person has a vested interest in any rule of law entitling him to insist that it shall remain unchanged for his benefit." (Citing) *Munn vs. Illinois* 94, U. S. 113; *Hurtado vs. California*, 110 U. S., 516; *Martyn vs. Pittsburgh and L. E. R. Co.*, 203 U. S. 284; *Mondou vs. New York, and H. R. Co.* 223, U. S. 1; *Chicago, and A. R. Co., vs. Tranbarger* 238, U. S. 67; and again on the same page he says:

"Indeed liability may be imposed for the consequences of a failure to comply with a statutory duty, irrespective of negligence in the ordinary sense; safety appliance acts being a familiar instance. *St. Louis I. M. & S. R. Co., vs. Taylor*, 210 U. S. 281; *Texas & P. R. Co., vs. Rigsby*, 241 U. S. 33;

The fault may be that of the employer himself, or—most frequently—that of another for whose conduct he is made responsible according to the maxim *respondeat superior*. In the latter case the employer may be entirely blameless, may have exercised the utmost human foresight to safeguard the employee; yet, if the alter ego, while acting within the scope of his duties, be negligent,—in disobedience, it may be, of the employer's positive and specific command,—the employer is answerable for the con-

sequences. It cannot be that the rule embodied in the maxim is unalterable by legislation.

The immunity of the employer from responsibility to an employee for the negligence of a fellow employee is of comparatively recent origin, it being the product of the judicial conception that the probability of a fellow workman's negligence is one of the natural and ordinary risk of the occupation, assumed by the employee and presumably taken into account in the fixing of his wages. The earliest reported cases are *Murray vs. South Carolina R. Co.*, (1841) 385 Am Dec. 268."

and on page (200)

"This court repeatedly has upheld the authority of the states to establish by legislation departures from the fellow-servant rule and other common-law rules affecting the employer's liability for personal injuries to the employee." *Missouri P. R. Co., vs. Mackey*, 127 U. S. 205, 208, 32 L. Ed., 107, 108 8 Sup. Ct. Rep. 1161;

*Minneapolis & St. L. R. Co., vs. Herrick*, 127 U. S. 210, 32 L. Ed., 109, 8 Sup. Ct. Rep. 1176; *Minnesota Iron Co., vs. Kline*, 199 U. S. 593, 598, 50 L. Ed., 332, 325, 26 Sup. Ct. Rep. 159, 19 A. M. Neg. Rep. 625; *Tullis vs. Lake Erie & W. R. Co.*, 175 U. S. 348, 44 L. Ed., 192, 20 Sup. Ct. Rep. 136; *Louisville & N. R. Co., vs. Melton* 218 U. S. 36, 53, 54 L. Ed. 921, 928, 47 L. R. A. (N. S.) 84, 30 Sup. Ct. Rep. 676; *Chicago,*

I. & R. L. Co., vs. Hackett, 228 U. S. 559, 57 L. Ed. 966, 33 Sup. Ct. Rep. 581; Wilmington Star Min. Co., vs. Fulton, 205 U. S. 60, 73, 51 L. Ed., 708, 715, 27 Sup. Ct. Rep. 412; Missouri P. R. Co., vs. Castle, 224 U. S. 541, 544, 56 L. Ed. 875, 878, 32 Sup. Ct. Rep. 606. A corresponding power on the part of Congress when legislating within its appropriate sphere, was sustained in second employers' liability cases (*Mondou vs. New York, N. H. & H. R. Co.*,) 223 U. S. 1, 56 L. Ed. 327, 38 L. R. A. (N. S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875, and see *El Paso & N. E. R. Co., vs. Gutierrez*, 215 U. S. 87, 97, 54 L. Ed., 106, 111, 30 Sup. Ct. Rep. 21; *Baltimore & O. R. Co., vs. Interstate Commerce Commission*, 221 U. S. 612, 619, 55 L. Ed. 878, 883, 31 Sup. Ct. Rep. 621."

In rendering its decision in that case this court sustained a much more radical departure from the previous statutory acts, affecting an employers liability than is presented in the case at bar. In the *White* case the court held that it was not unconstitutional, to make an employer liable when he was without fault and when the employee's negligence was the sole cause of the injury and when the compensation recoverable was in excess of the damages sustained.

In the present case the only departure from the old common law liability before it had been altered beyond recognition by the product of judicial conception (*New York Central R. Co., vs. White* supra, page 199) is that the employer may be liable for all damages sustained, though no negligence is shown to have been committed by him or anyone else providing the employer is without

fault. It practically makes the act of every person except the employee himself and every factor causing the accident the agent of the employer.

This is the same liability under which every railroad or common carrier is placed as respects its passengers. No reason of law will prevent a legislature from placing the same liability upon an employer engaged in a hazardous enterprise.

So well settled is the principal of law that liability may be created without fault, when the injured party is not negligent, that it becomes idle to discuss this contention of the plaintiff in error further than to cite the following cases.

“New York Central vs. White, (Supra) 243 U. S. 188; Sherlock vs. Alling, 93 U. S. 99; Missouri P. R. Co., vs. Castle 224 U. S. 541; St. Louis & S. T. R. Co., vs. Mathews, 165 U. S. 1; Chicago R. I. & P. R. Co., vs. Zerneck, 183 U. S. 582; Jesen vs. Southern Pac. Co., 215 N. Y. 514; Noble State Bank vs. Haskell, 219 U. S. 104; Chicago vs. Sturges 222 U. S. 313; McLean vs. Arkansas 211 U. S. 550; Louisville & N. R. Co., vs. Melton 218 U. S. 36; Atlantic Coast Line R. Co., vs. Riverside Mills, 219 U. S. 186; Darlington vs. N. Y. 164; Mondou vs. New York N. H. & H. R. Co., 223 U. S. 1;”

We have thus far been discussing the act in those cases in which the employee could obtain full damages which required that he should not be guilty of contributory negligence.

Section 3, 159 of the Liability Act, also provides that when the employee has been guilty of contributory negligence such fact shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such an employee.

When such negligence occurs the act becomes more similar to the workman's liability act of New York in that it does not prevent a recovery by the employee, but it is dissimilar in that it only allows him a partial recovery. In this it approaches the rules of law controlling in admiralty in a tort action resulting in damage to property. Contributory negligence on the part of the libellant is not necessarily a bar to his recovery. The court will apportion the damages. "The Max Morris 137 U. S. 1; Smith vs. Shakopee, 103 Fed. 240; The Mystic 44 Fed. 398; Anderson vs The Ashebrooke, 44 Fed. 124, The Truro 31 Fed. 158; The Mabel Comeaux, 24 Fed. 490; The Wanderer 20 Fed. 140;

Courts of admiralty are not bound by the common and civil law rules governing contributory negligence but award or withhold damages according to principles of equity and justice in the exercise of a sound discretion. Olson vs. Flavel 13, Sawy. (U. S.) 232; The Wanderer, supra; McCord vs. The Steamboat Tiber, 6 Biss (U. S.) 409. It has long been the rule of the civil law that contributory negligence on the part of plaintiff is a complete defense. This is not founded upon any constitutional right. If it were it would apply to such torts in admiralty as well.

Since a person sustaining damages to his property, though guilty of contributory negligence, may obtain

redress in admiralty for such proportionate share of damages as is not caused by his own negligence there can be no reason, legal or otherwise, why a similar principal of law cannot and should not be extended to damages for personal injuries. If courts of admiralty can award or withhold property damages according to principals of equity and justice there is no reason why a legislature cannot make a similar law so that an injured employee may likewise recover damages according to equity and justice.

In the Mondou case (*Supra*) this court held that the Federal Employer's Liability Act (35 Stat. at L. 65, chap. 149, U. S. comp. Stat. Supp. 1909, P 1171) and the amendment of April 5th, 1910, which had a provision identical to the Arizona Act was constitutional. The provisions of that act so far as relating to contributory negligence is as follows:

"That in all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this act, to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: provided, that no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute

enacted for the safety of employees contributed to the injury or death of such employee."

In the Castle case (*supra*) this court passed upon the constitutionality of a similar statute of Nebraska and held it valid. Chief Justice White at page 544 says:

"Obviously the same reason which justified a departure from the common law rule in respect to the negligence of a fellow servant also justify a similar departure in regard to the effect of contributory negligence, and the cases above cited in principal are therefor authoritative as to the lawfulness of the modification made by the 2d section of the statute under consideration of the rule of contributory negligence as applied to railway employees. The decision in the Mondou case sustaining the validity of the Federal employee's liability act, practically forecloses all question as to the authority possessed by the State of Nebraska by virtue of its police power to enact in question, and to confine the benefits of such legislation to the employees of railroad companies;"

## II

THE FACT THAT THE EMPLOYER'S LIABILITY ACT PROVIDES FOR INTEREST UPON THE JUDGMENT IN THE EVENT THAT AN APPEAL IS TAKEN DOES NOT VIOLATE ANY OF THE PROVISIONS OF THE UNITED STATES CONSTITUTION OR THE AMENDMENTS THERETO.

At the time the act in question was passed there

were no usury laws. Section 2774 of Title 37, of the Revised Statutes of Arizona 1901, in effect at that time is as follows:

"In the absence of an agreement, in writing, signed by the debtor, interest shall be paid at the rate of six (6) per cent. per annum on money due on any bond, bill, promissory note or other instrument, in writing, on judgments, on money lent, on the sum due on accounts stated, on the sum due, from the time it is audited, from the territory, any county, city or village: provided, however, a different rate of interest, if agreed to in writing, signed by the payor, shall be paid. A judgment rendered on such agreement shall bear the rate of interest provided in the agreement, and it shall be so specified in the judgment."

Section 3505, Title 25, of the Revised Statute of Arizona, 1913, being chapter 55, law 1913, of the Second Special Session is as follows:

"The interest for any legal indebtedness shall be at the rate of six dollars upon one hundred dollars for a year, unless a different rate is contracted in writing; provided, however, that a different rate of interest, not to exceed ten (10) per cent per annum, if agreed to in writing, signed by the debtor, shall be paid. A judgment rendered on such agreement shall bear the rate of interest provided in the agreement, and it shall be so specified in the judgment."



The latter part of Section 4916, of the Revised Statutes of Arizona, 1913, in reference to interest on taxes is as follows;

"All taxes hereinafter contained in the "back tax book" herein described, shall bear interest from the time of the delinquency at the rate of ten (10) per cent per annum until paid. In computing interest under this act a fraction of a month shall be counted as a whole month."

Section 103, Title 1, Revised Statutes of Arizona, 1913 provides as follows;

"If upon presentation to the State Treasurer of any warrant, he has not the funds in hand to pay the same, he shall endorse the day of its presentation upon the back of the warrant and whenever it is paid, interest, at the rate of five per cent per annum, in lawful money of the United States, shall be allowed from said day, and paid in addition to the principal thereof;"

It is to be seen that there are several rates of interest provided for by Statute. The ordinary contract can bear any rate of interest agreed upon not to exceed ten (10) per cent, and the judgment upon such an agreement shall bear interest at the rate of the agreement. Upon a warrant the interest payable is five (5) per cent. Upon delinquent taxes it is ten (10) per cent with the further provision that any part of a month shall be termed as a whole month in computing the interest.

It is further to be noted that up to and at the time

of enactment of the Employer's Liability Act, the parties could agree on any rate of interest and that such interest would be legal and a judgment upon such a contract would draw the same interest.

It is rather unreasonable for the plaintiff in error to contend that twelve (12) per cent interest on a judgment for personal injuries is taking property without due process of law. Several rates of interest have been established for different contracts. Judgments draw the same interest as the contract sued upon. It can hardly be termed an unreasonable rate when the banks generally charge ten (10) per cent and take the interest out in advance.

Nor is it taking property without due process of law. Nor is it unusual, nor unreasonable to make different rates of interest upon different classes of indebtedness.

In the case of *The United Central Life Insurance Co., appellee vs. Chowning, appellant.*, 96 Texas 654, 24 L. A. R. 504., the court held valid article 2953 of the Revised Statute of Texas, which is as follows;

**"PENALTY FOR FAILURE TO PAY LOSS.** In all cases where a loss occurs and the life or health insurance company, liable therefor shall fail to pay the same within the time specified in the policy, after demand therefor, such company shall be liable to pay the holder of such policy, in addition to the amount of the loss, twelve (12) per cent damages on the amount of such loss, together with all

reasonable attorney's fees for the prosecution and collection of such loss."

In the *Missouri Pacific R. Company*, appellee vs. Mackey 127 U. S. 205, the court says;

"And when legislation applies to particular bodies or associations, imposing upon them additional liabilities, it is not open to the objection that it denies to them the equal protection of the laws, if all persons brought under its influence are treated alike under the same conditions."

"Such legislation is not obnoxious to the last clause of the fourteenth (14) amendment, if all persons subject to it are treated alike, under similar circumstances and conditions in respect both of the privileges conferred and the liabilities imposed."

The same principle of law has been held valid in the following cases: *The Pembina Con. Silver Mine vs. Pennsylvania*, 125 U. S. 18; *Pacific Exp. Co. vs. Seibert*, 142 U. S. 353; *Charlotte Co., & A. R. Co., vs. Gibbes* 143 U. S. 391; *New York vs. Squire* 145 U. S. 175; *Fraternal Mystic Circle vs. Snyder* 227 U. S. 497; *Alliance Co-operative Ins., Co. vs. Corbett*, 69 Kan. 564, 77 Pac. 108; *Aldrison T. & S. F. R. Co., vs. Mathews*, 174 U. S. 96; *Fidelity Mut. Life Association vs. Mettler* 185 U. S. 308; *Iowa L. Ins. Co., vs. Lewis* 187 U. S. 335; *Farmers & M. Ins. Co., vs. Pobney* 189 U. S. 301; *Seaboard Air Line R. Co., vs. Seegors* 207, U. S. 73; *Yazoo & M. Valley R. Co., vs Jackson & Co.*, 226 U. S. 217;

It is not unusual for the several states to establish various rates of interest for the different obligations which give the successful plaintiff an additional amount to that actually due.

In foreclosure suits generally the complainants are entitled to tax and recover as cost upon the sale of the property an allowance fixed by statute in addition to the principal sum due.

Par. II, of rule 23 of the Rules of Practice of this court provide that in certain cases an additional amount of ten (10) per cent of the judgment in addition to interest shall be awarded to the defendant in error upon the affirmance of the judgment.

The contention of the plaintiff in error that the interest provision of twelve (12) per cent makes the act unconstitutional is without merit.

### III.

THE OPTION GIVEN THE EMPLOYEE OF ACCEPTING COMPENSATION UNDER THE WORKMAN'S COMPENSATION ACT OR RECOVERING UNDER THE EMPLOYER'S LIABILITY ACT DOES NOT AFFECT THE CONSTITUTION-ITY OF THE LATTER ACT.

If the giving of such an option is unconstitutional it is the compensation act affected and not the Employer's Liability Act under which this action was brought. This act was passed at the general session of the legislation and was in full force and effect prior to the enactment of the Compensation Act. Its con-

stitutionality must be tested at the time of its enactment, and a subsequent law giving the employee an option of taking advantage of such subsequent or previous law could affect only the constitutionality of the latter act.

The Compensation Act of New York, which this Hon. Court held constitutional in the *White* case, *Supra*, also gave the injured employee an option of proceeding under that act in certain cases or to commence an action for damages in which contributory negligence on the part of the employee or co-employee, or assumption of risk would not be a defense.

In the case of *Cunningham vs. Northwestern Improvement Company*, (*supra*) the Supreme Court of Montana, in construing the Compensation Act of that state (See chapter 67. laws 1909) which gave the injured employee the right to take compensation under the act and also reserve to him the right of a common law action, held that this option given to the employee did not in any way affect the constitutionality of the act. The court says, 119 Pac. Rep. 566, "We have decided that the fact that actions at law are not abolished by the act is not, in itself, a sufficient reason for declaring the statute unconstitutional."

The rule of law giving the injured party in any action arising out of fraud the option of bringing an action for the return of the property or suing for damages has never been questioned.

When personal property is tortiously taken and converted the owner may waive the tort and sue the wrong doer in assumpsit for its value. *Terry vs. Munger* 121 N. Y. 161, 24 N. E. 272.

Even when the property taken has not been converted the owner may have a similar right. *Terry vs. Munger Supra.* *Wiler vs. Kershner*, 109 Pa. St. 219; *Robertson vs. Dunn* 87, N. C. 191; *Knapp vs. Hobbs*, 50 N. H. 476; *Grinnelle vs. Anderson* 122 Mich. 533; 81 N. W. 329;

### IN CONCLUSION

The judgment should be affirmed and the writ of error dismissed.

Respectfully submitted,

HUGH M. FOSTER,  
GRAHAM FOSTER,  
GEORGE F. SENNER,

Attorneys for Defendant in Error.  
Globe, Arizona

(26,289)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 822.

THE SUPERIOR & PITTSBURG COPPER COMPANY, PLAINTIFF IN ERROR,

*vs.*

FRANK TOMICH, SOMETIMES KNOWN AS FRANK THOMAS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ARIZONA.

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a In the Supreme Court of the State of Arizona.

Cause No. 1535.

SUPERIOR & PITTSBURG COPPER COMPANY, a Corporation, Appellant,

vs.

FRANK TOMICH, Sometimes Known as FRANK THOMAS, Appellee.

TRANSCRIPT OF RECORD.

Appearances:

For the Appellant and Plaintiff in Error: Cleon T. Knapp, James P. Boyle, Harry E. Pickett.

For the Appellee and Defendant in Error: Fred Sutter, J. T. Kingsbury.

1 In the Superior Court of the State of Arizona in and for Cochise County.

FRANK TOMICH, Sometimes Known as FRANK THOMAS, Plaintiff,

vs.

SUPERIOR & PITTSBURG COPPER COMPANY, a Corporation, Defendant.

*Complaint.*

Plaintiff complains of defendant and for cause of action alleges:

I.

That plaintiff is a resident of Cochise County, State of Arizona; and that he is sometimes known by the name of Frank Thomas, but that his true name is Frank Tomich; that the defendant is a corporation doing business under the laws of the State of Arizona.

2

II.

That the defendant at all the times mentioned herein owned, operated and worked a mine situated in the Warren Mining District, Cochise County, State of Arizona, which said mine is known as the Cole Shaft or Mine.

III.

That on or about the 9th day of November, 1914, the plaintiff for a consideration was employed by the defendant to work under

ground in said mine: That one of the duties plaintiff was to perform, by virtue of such employment, was to load, unload, dump, handle, push and operate certain ore cars in said mine: That while plaintiff was handling, pushing and operating one of said ore cars, in the due course of his said employment, in a certain drift connected with said Cole Shaft, and on the Nine Hundred (900) foot level thereof, plaintiff's right hand was caught between said car and one of the timbers in said drift and said hand was thereby mangled, bruised and injured and the first three fingers of said hand were so badly bruised, mangled and injured that they were severed, removed and cut off, and that because of such injury to said hand and the loss of said three fingers the use of plaintiff's right hand has been wholly lost and plaintiff has, thereby, been incapacitated from earning a living.

## IV.

3 That said right hand of plaintiff and said three fingers were caught between said car and timbers and injured, as aforesaid, without any negligence on the part of plaintiff.

## V.

That said injury to said hand and to said three fingers was caused by an accident arising out of and in the due course of said labor, service and employment then and there engaged in by plaintiff for the defendant, as aforesaid, and was due to a condition or conditions of such occupation or employment; and that said injury to said hand and to said three fingers happened in the due course of plaintiff's employment for defendant and while plaintiff was in the performance of his duty under such employment, to-wit: pushing, moving, loading, unloading, dumping, operating and handling ore cars in said mine owned, operated and controlled by defendant.

## VI.

That said defendant did not itself, nor did any of its agents, inform plaintiff nor any of its other employes engaged in like occupation, by rules, regulations or instructions, as to the duties and restrictions of his employment to the end of protecting plaintiff and said other employes in his said employment.

## VII.

4 That plaintiff at the time of said accident was an able-bodied man of the age of twenty-nine (29) years and was capable of earning and did earn the sum of four dollars (\$4) per day: That by reason of said injury his earning capacity has been greatly diminished and lessened.

## VIII.

That as a result of said accident and injury plaintiff suffered great mental and physical pain.

## IX.

That by reason of said accident and said injury plaintiff has suffered damages in the sum of Fifteen Thousand Dollars (\$15,000).

Wherefore, plaintiff prays judgment against the defendant for the sum of Fifteen Thousand Dollars (\$15,000) and for his costs and disbursements expended herein.

FRED SUTTER,  
*Attorney for Plaintiff.*

For a further and separate cause of action against the defendant the plaintiff alleges as follows:

## I.

That plaintiff is a resident of Cochise County, State of Arizona; and that he is sometimes known by the name of Frank Thomas, but that his true name is Frank Tomich: That the defendant is a corporation doing business under the laws of the State of Arizona.

## II.

That the defendant during the times herein mentioned was engaged in the business of mining in the Warren District, Cochise County, State of Arizona: That in the course of said business and on or about the 9th day of November, 1914, the defendant owned, operated and worked what is known as the Cole Shaft or Mine, in said District.

## III.

That on or about the said 9th day of November, 1914, the plaintiff was employed by the defendant for a valuable consideration as a laborer in its said mine in said District: That his work consisted partly in running, loading, unloading, pushing, dumping and operating ore cars in said mine.

## IV.

That on said 9th day of November, 1914, in the due and proper performance of his duties, under and by virtue of such employment, the plaintiff was handling and operating one of said ore cars, which was loaded with ore, on a track in a drift or tunnel connected with said Cole Shaft of said mine on the nine hundred (900) foot level

thereof. That said track in said drift or tunnel was laid on a steep grade and incline and ran toward and in the direction of a certain ore chute, into which chute plaintiff was to dump the ore contained in said car: That around said chute and above the same were certain timbers in close proximity to said chute: That because of the steep grade and incline of said track running toward said chute, it was impossible to hold back and retard the speed of said ore cars, when loaded with ore. That said car that plaintiff was handling and operating, as aforesaid, was loaded with heavy ore, and without any fault or negligence of said plaintiff, ran  
6 down said track on said steep grade and incline in said drift at a high rate of speed and ran against one of the timbers around said chute and suddenly dumped and turned over and caught plaintiff's right hand between said car and one of said timbers and crushed, bruised and mangled said hand and crushed and bruised the first three fingers of said hand in such a manner that the same were removed and cut off.

## V.

That said defendant carelessly and negligently kept and maintained said track in said drift, and said timbers, at a steep and dangerous grade and incline, and carelessly and negligently placed said timbers around and above said chute in such a manner as not to protect plaintiff in his work, and that defendant failed to have, keep and maintain said drift, tunnel, track and chute in a reasonably safe condition and carelessly and negligently failed to have, keep and maintain the place in which plaintiff was working in a reasonably safe condition; and that said accident and injury to plaintiff was caused solely through the negligence and carelessness and wrongful acts and omission of defendant and its servants and without fault or negligence on the part of plaintiff.

## VI.

That plaintiff can speak and understand but little of the English language and at the time of said accident plaintiff was an inexperienced miner and relied on the defendant to instruct and  
7 protect him in his employment and to furnish him with a reasonable safe place within which to work.

## VII.

That said defendant did not itself, nor did any of its agents ever inform plaintiff, nor any of its other employees engaged in like occupation, by rules, regulations, or instructions as to the duties and restrictions of his employment, to the end of protecting plaintiff and said other employees in their said employment.

## VIII.

That said plaintiff is a married man, with a wife and three small children, dependent on him for support and that prior to said injury plaintiff was an able-bodied man, capable of earning and did earn Four Dollars (\$4.00) per day: That plaintiff is twenty-nine (29) years old.

## IX.

That by reason of said injury plaintiff suffered great physical and mental pain and anguish.

## X.

That on account of said injury plaintiff has become incapacitated to earn a livelihood and to support his said family and his earning capacity has been greatly diminished and decreased.

## XI.

That because of said injury defendant has damaged plaintiff and plaintiff has suffered damages in the sum of Fifteen Thousand Dollars (\$15,000.00).

8 Wherefore, plaintiff prays judgment against the defendant for the sum of Fifteen Thousand Dollars (\$15,000) and for his costs and disbursements expended herein.

FRED SUTTER,

*Attorney for Plaintiff.*

Filed Feb. 20, 1915.

(Title of Court and Cause.)

*Fourth Amended Answer.*

Comes now the Superior & Pittsburg Copper Company, defendant above named, and for its fourth amended answer to the complaint herein, alleges:

*Demurrer.*

## I.

That the complaint shows that plaintiff seeks to recover judgment against defendant under and by virtue of Chapter VI, of Title XIV, of the Revised Statutes of Arizona, 1913, known as the "Employers' Liability Law," and Section 7 of Article XVIII of the Constitution of the State of Arizona, and that said Employers' Liability Law, and said section of the Constitution of Arizona are both unconstitutional and void, in that said provisions are contrary to and contravene the

Fourteenth Amendment to the Constitution of the United States, in that said provisions deprive the defendant of its property, without due process of law and denies to it the equal protection of the law, by subjecting it to unlimited liability for damages for personal injuries suffered by its employes without any fault or negligence on the part of the defendant causing such injury or contributing thereto, and therefore that plaintiff's complaint fails to state facts sufficient to constitute a cause of action against defendant.

## II.

That it appears on the face of said complaint that plaintiff seeks to recover judgment against defendant under and by virtue of the provisions of Chapter VI, of Title XIV, of the Civil Code, Revised Statutes of Arizona, 1913, known as the Employers' Liability Law, and that said Employers' Liability Law is in violation and contravention of the Constitution of the State of Arizona, and particularly of Sections 5 and 7 of Article XVIII thereof, in that said Employers' Liability Law attempts to give plaintiff the right to recover damages of defendant in this action notwithstanding that the injuries for which said damages are claimed, were contributed to and in part caused by plaintiff's own negligence, and attempts to deprive the defendant of the right to wholly defeat this action by showing that said injuries were contributed to and in part caused by plaintiff's own negligence and that for the reasons in this demurrer set forth said complaint does not state facts sufficient to constitute a cause of action against defendant.

Wherefore defendant prays judgment as to the sufficiency of said complaint and for its costs.

KNAPP & D'AUTREMONT,

H. E. PICKETT,

*Attorneys for Defendant.*

And further answering plaintiff's complaint herein, though not waiving any defense, or defenses hereinbefore interposed, defendant denies, admits and alleges as follows:

## I.

Admits the allegations of paragraphs I and II as set forth in said complaint: and denies each and every allegation contained in said complaint, as alleged, except as herein admitted or otherwise qualified; and denies each and every allegation contained in paragraphs numbered III, IV, V, VI, VII, VIII and IX.

## II.

Alleges that if the plaintiff has suffered any injury, either as alleged in the complaint or otherwise, which is not admitted but is

expressly denied, such damage or injury wholly resulted from, and was wholly caused by, plaintiff's willful neglect and carelessness and his failure to use any care or caution in his own behalf at the time and place of said alleged injury.

## III.

11 That the alleged injury or injuries, either as alleged in the complaint or otherwise, were contributed to, and in part caused by plaintiff's own negligence in this, that plaintiff was giving no attention, or insufficient attention, to his duties as a car man, and for that reason failed to push his car in a proper manner, or place or hold his hands in a proper position on said car, that he failed to dump his car at a certain chute, in a proper manner; that because plaintiff was then and there holding his hands in an improper position and place, on said car, and because of the reckless and negligent manner of pushing and dumping his said car, plaintiff's right hand was caught between the said car and the protecting bar of said chute; and in other respects plaintiff was guilty of negligence contributing to his injury.

Wherefore defendant prays judgment of the Court that plaintiff take nothing by his action, but that his complaint be dismissed, and for its costs.

KNAPP & D'AUTREMONT,  
H. E. PICKETT,  
*Attorneys for Defendant.*

Filed Feb. 15, 1916.

12 (Title of Court and Cause.)

*Reporter's Transcript of Evidence.*

FRANK TOMICH, Plaintiff, being called as a witness in his own behalf, and having been duly sworn according to law, through the interpreter, testified as follows:

Direct examination.

By Judge Sutter:

Q. You may state your name.

A. Frank Tomich.

Q. Have you ever gone under any other name?

A. Yes, Frank Thomas.

Q. Why did you go under the name of Frank Thomas?

A. It is easier written.

Q. What is it?

A. It is easier written.

Q. Are you acquainted with the Superior and Pittsburg Copper Company, a corporation, the defendant in this action?

A. Yes, sir.

Q. What is your occupation?

A. Carman and miner.

Q. How long have you been a carman and miner?

13 A. Three years.

Q. Where were you working on the 9th day of November, 1914?

A. Cole shaft, nine hundred level.

Q. The Cole shaft. That is owned by this defendant.

Judge Sutter: That is admitted any way in this complaint.

Mr. d'Antremont: Yes.

Q. How long had you worked for the defendant?

A. Three years.

Q. What were you doing on the morning of the 9th of November?

A. I was pushing a car.

Q. For whom, this defendant?

A. Yes, sir.

Q. On the nine hundred level of the Cole shaft?

A. Yes, sir.

Q. Was it under ground?

A. Yes, sir, under ground.

Q. How long—What, if anything, unusual happened to you on the morning of the 9th of November in the course of your employment?

Mr. d'Antremont: If the interpreter can't repeat all of that verbatim, would rather have the witness stopped.

The Court: Yes, ask him to repeat part of it at a time.

The Witness: I was pushing a car, and as I was walking pretty fast, I slipped.

Q. What happened then?

14 A. When I was trying to hold on to the car and going pretty fast, and the car dumped and caught my fingers between the timber and the car.

Q. Between the timber and the car?

A. Yes sir.

Q. What was the condition of the track at the place where this accident happened on the 9th on the nine hundred foot level?

A. The grade of the track was sloping down hill, down grade and there was no planks to walk on.

Q. Yes?

A. Only the ties.

Q. Now, which fingers, which of your fingers were caught between the car and the timber?

A. The three first fingers on the right hand.

Q. Three first fingers?

A. Three first, first fingers on the right hand.

Q. How long had you been working that morning when this accident happened?



A. Up until nine o'clock.

Q. What time did you go to work?

A. Seven-thirty.

Q. Now, will you describe to the jury how you were handling that car at the time the accident happened?

A. I was holding on to the car with my hands.

Q. Holding on to the car with your hands on to the rear end of the car, I suppose?

Mr. d'Antremont: Don't lead him.

15 Q. Well, on what part of the car were your hands?

A. On the middle of the car in the back.

Q. Were you handling this car the same as you handled other cars?

Mr. d'Antremont: We object to that as leading.

The Court: Objection overruled.

The Interpreter: What was the question.

Q. Were you handling this car the same as you had handled other cars?

A. Yes sir.

Q. Who furnished you that car?

A. The company.

Q. Now, at the time—I will withdraw that. He said the car dumped. At the time the car dumped—I withdraw that. Immediately after the car dumped, where were the hind wheels of the car? Describe their position?

A. Up in the air.

Q. Where was your body immediately after the car dumped?

A. I was hanging to the car. I was up in the air too.

Q. On what was your body resting?

A. I was hanging to the car.

Q. Where was your right hand?

A. Between the car and the plank.

Q. Between the car and the plank?

A. Yes sir.

Q. How long did you remain in that position?

16 Mr. D'Antremont: Did you say "a plank" or "the plank."

The Interpreter: "The" I understand.

Judge Sutter: Ask him the question again.

(Question repeated by the Interpreter.)

The Interpreter: He says the hand was right between the car and the plank.

The Court: What plank?

The Interpreter: The plank that was above this.

The Court: Ask him the question.

The Witness: The plank that was above the chute; up above the chute.

Q. How far was that plank from the ground?

A. Between four and five feet.

Q. How long did you remain in the position, with your hand caught between the car and the plank?

A. No, about twenty minutes, I suppose.

Q. Was any one else present when the accident happened?

A. No sir.

Q. How did you release yourself from that position?

A. With my left hand, I pulled the car backwards, and that got my fingers loose.

Q. Then what did you do after you had released your fingers?

A. I sit down for about ten minutes or so.

Q. Why did you sit down?

A. I didn't know what else to do.

17 Q. Then what did you do?

A. I started to go towards the switch, and then I met a fellow passing by, and I met the shifter next, and he took me to the station.

Q. Then what happened?

A. He tied my hand, and he sent me up on top.

Q. Then what did you do?

A. I went to the watchman and changed my clothes, and they sent me to the hospital.

Q. What hospital did they send you to?

A. C. & A. Hospital.

Judge Sutter: Now, it is admitted that the C. & A. Hospital is the same as the Superior and Pittsburg Hospital?

Mr. d'Antremont: Yes.

Judge Sutter: Let the record show they are the same hospital.

Q. After you got to the hospital, what did they do to you?

A. They fixed my hand; treated my hand.

Q. Who treated your hand?

A. Dr. Bledsoe and Dr. Patton.

Q. After they treated your hand, what did you do and where did you go?

A. I stayed right there in the hospital.

Q. How long did you remain in the hospital?

A. Five days.

Q. After the five days that you remained in the hospital, where did you go?

18 A. I went home.

Q. After you went home, did you return to the hospital, or the company's dispensary for further treatment?

A. I went to the Bisbee dispensary for treatment.

Q. By "Bisbee dispensary", what do you mean, the company dispensary?

A. Yes sir, company dispensary.

Q. For how long a time did you go to the dispensary for further treatment?

A. One month and twenty-four days.

Q. After the expiration of one month and twenty-four days, did you go to work?

A. Yes sir.

Q. Where did you go to work?

A. Cole shaft.

Q. For the defendant?

A. Yes sir.

Q. How long did you work?

A. Two hours and a half.

Q. Why didn't you work longer?

A. I could not because my hand pained.

Q. Have you done any other work, or followed your occupation as miner and carman since this accident happened?

A. No sir?

Q. Why not?

A. Because I could not work.

19 Q. Why couldn't you work?

A. Because my hand pained me so that I could not work.

Q. What effect, if any, has the injury on the first three fingers of your right hand had upon your system?

Mr. d'Autremont: I object to that, it not being alleged in the complaint of any other injury, and there is no other issue here except the man's fingers.

Judge Sutter: All damages resulting therefrom, and I have alleged physical pain and suffering, and he has a right to describe it.

Mr. d'Autremont: As to his fingers.

Judge Sutter: There is a world of authorities on that. I have them right here if the Court wants to see them.

20 The Court: The physical pain and suffering resulting from the injury to the plaintiff is admissible whether directly to the fingers or not. The objection will be overruled.

Q. Describe—I will change the form of the question. Describe the effect the injury to the first three fingers of your right hand had upon your system?

A. It pained me just like if needles were in it, and also my whole right arm.

Q. What, if any effect has it had upon your sleep at night?

A. I could not sleep either.

Q. Now, stand up before the jury, and show them your right hand.

(The witness now stands up before the jury, and exhibits his right hand.)

Judge Sutter: Now if the jury wants to touch the ends of those fingers, press on them hard, I desire them to do so.

(The different members of the jury touch the witness's fingers on the right hand, and the witness flinches each time the ends of his fingers are touched.)

21 Q. How old are you—How old were you on the date this accident happened to you?

A. Thirty years old.

Q. What wages were you earning on the date this accident happened to you?

A. Three seventy-five.

Q. Was that the average wages paid miners at that time?

A. At that time most of them got three seventy-five and four.

Q. Have you been able to earn those wages since the date of the accident?

A. No sir.

Q. Why not?

A. I could not work.

Q. Why couldn't you work?

A. Because my hand pained me.

Q. Which hand?

A. Right hand.

Q. Have you consulted any other doctor or physician since the date of this accident, other than Dr. Bledsoe or Patton?

A. I saw Dr. Hawley.

Q. About what time, if you remember, did you consult Dr. Hawley?

22 A. The month of June.

Q. Last year?

A. Yes sir.

Q. Did he examine your right hand?

A. Yes sir.

Q. How long before did you consult him concerning your hand?

A. About twenty-two days.

23 Q. What did he tell you?

Mr. d'Autremont: I object to that.

Q. After examining your hand?

Mr. d'Autremont: I object to that as incompetent, irrelevant and immaterial.

The Court: Objection sustained.

Q. Has any other doctor examined your hand other than Hawley, Patton and Bledsoe?

A. He says no other doctor.

Q. Don't say "he says." Answer the question.

A. Another doctor, but I don't know his name.

Q. Has any doctor here in Tombstone examined your hand?

A. No sir.

Judge Sutter: Probably I didn't explain it to him it was a doctor that examined him.

Q. Did anybody examine your hand yesterday?

A. No sir.

Q. Yesterday afternoon immediately after you came to Tombstone, did any one call at the hotel and examine your hand?

A. No sir.

Judge Sutter: Well, that is immaterial. We will have it examined again, and I will tell him it is a doctor. That is all for the present.

24 The first job I had was mucker in the Lowell mine, for the Copper Queen at the Gardner or Lowell. I had held that job 5 months, then, was a carman and mucker at the Lowell so I had been a carman about 5 years and a half. I weigh about 180 pounds. I do not feel pretty strong now. I pushed my car continuously for 5 years, except a year off when I could not get work. I am from Austria. I went to Michigan first. I worked there 5 years, so I have worked altogether in this country eleven years. In Michigan I was fixing track in the mines and also pipeman. I learned only a little English in Michigan. I don't know when I went to work in the Cole. I don't know how long I worked or when I went there. Three years I worked there. I was a carman all the time. I was not on the 900 level when they opened it up. I worked on the 900 level all the time I was there. I worked as miner and carman. I was not familiar with this part of the 900 level on November 9th, 1914, the date of the accident, because that was the first shift I worked in that place. I was dumping ore down the chute. I dumped about seven or eight cars. I got the ore from the chute, the same chute each time and dumped it down the same chute each time. I don't know how many trips I made over this track that morning.

The track was straight and down a hill. The down hill part started a little ahead of the chute from which I loaded.

Q. About how much down hill was that chute?

The Interpreter: I don't think that he understands the question. Ten or twelve feet. You want to know how much descent grade it was.

25 The Court: Cross examine.

Cross-examination.

By Mr. d'Antremont:

Q. When did you come to this country?

A. About six years.

Q. Did you understand me when I said that?

A. No.

Q. Did you understand that last question?

A. No.

Q. You speak a little English?

A. Very little.

Q. Where did you live the last six years?

A. Bisbee.

Q. Did you live in Bisbee the entire six years?

A. Yes sir.

Q. What were you doing during those six years?

A. I worked as a carman and a miner.

Q. What was the first job you ever had?

A. Mucker.

Q. Where?

A. In the Lowell Mine, for the Copper Queen, Gardner; I don't know whether it is Lowell or Gardner.

Q. How long did you hold that job?

A. Five months.

Q. And then what job did you have?

26 A. Then at the Lowell.

Q. And what did you do there?

A. Carmen and mucker.

Q. Have you been a carman, then for about five years and a half?

A. Yes sir.

Q. How much do you weigh, Mr. Tomich?

A. One hundred and eighty pounds.

Q. You are a pretty strong fellow, ain't you?

A. Not now.

Q. Do you feel pretty weak now?

A. Yes sir.

Q. Did you push your car repeatedly and continuously during that five years?

A. No sir.

Q. How much of the time were you off?

A. A year; one year.

Q. What did you do during that year?

A. I could not get work.

Q. What province did you come from?

A. I am from Austria.

Q. Did you come direct to Bisbee?

A. No, Michigan.

Q. Did you work in Michigan?

A. Yes sir.

27 Q. How long were you there?

A. Five years.

Q. So altogether, you have been in this country about ten years?

A. Eleven years altogether.

Q. What kind of work did you do in Michigan?

A. I was fixing track in the mines, and also pipeman.

Q. Pipeman?

A. Yes sir.

Q. Then you have had ten years' experience in mines?

A. Yes sir.

Q. You learned a little English in Michigan?

A. No sir, not hardly any.

Q. When did you go to work in the Cole?

A. I don't know; I have forgot.

Q. Well, about how long did you work in the Cole shaft?

A. I don't know how long I worked, or when I went to work.

Judge Sutter: How long?

Q. When he went to work?

A. Three years.

Q. How long were you a carman in the Cole shaft?

A. I was pushing a car all the time.

Q. Were you on the nine hundred level when they opened it up?

28 A. No sir.

Q. How long were you on the nine hundred level?

A. I worked there all the time while I was there.

Q. Did you ever do anything on the nine hundred level in the Cole shaft except carman?

A. Yes, I worked as a miner, and a carman also.

Q. You were familiar with this part of the nine hundred level where this accident happened on November 9th, 1914?

A. I didn't, because that was the first shift I worked in that place.

Q. This was the first shift you ever worked? Were you dumping ore down the fifty-four chute?

Judge Sutter: If he knows the number of it.

Mr. d'Antremont: Yes, cut out "fifty-four" and say "where the accident happened; the chute where the accident happened"?

The Witness: Yes sir.

Q. And how many cars had you loaded that day?

A. About seven or eight.

Q. Where did you get this ore?

A. From the chute.

Q. Did you get this ore from the same chute each time?

A. Yes sir.

Q. And dumped it down the same chute each time?

A. Yes sir.

Q. So you had made about fifteen trips over this same track that morning?

29 A. I don't know how many.

Q. Was the track straight from the chute where you loaded your car to the chute where you dumped your car?

A. It was down hill; straight down hill.

Q. Where did this down hill part start?

A. Just a little ahead of the chute.

Q. Which chute?

A. Which chute?

Q. Yes?

A. A little ahead of the chute I loaded; where I was loading.

Q. That you were loading from or loading into?

A. Loading from.

Q. About how much down hill was that chute?

The Interpreter: I don't think that he understands the question. Ten or twelve feet. You want to know how much de-cent grade it was.

Q. Yes. Strike it out. About how steep was the grade of the track from this chute?

A. It was quite a bit below.

Q. Did you have to start pushing *the* car at this chute?

A. I had to push it a little to start.

Q. After you got it started, did you have to hold it back, or did you have to keep pushing it?

A. I had to walk pretty fast, this way (indicating) with the car.

Q. Did you have much trouble pushing the empty car back from the chute where you dumped the ore into?

30 A. Not very hard.

Q. Will you tell what the track looked like from the chute where you loaded to the chute where you dumped?

A. It looked like it was level, and there was nothing to walk on. There was ties to walk over.

Q. How high off the ground were the ties?

A. They are level with the ground.

Q. Then there was dirt between the ties?

A. Yes sir.

Q. So there was a smooth place to walk, as you walked along?

A. It was level.

Q. Well, was this nine hundred level wet or dry?

A. It was dry.

Q. What did the track—cut that out. Was there a track—cut that out. Was there a cross-cut running into the drift at right angles?

A. Yes sir, there was one.

Q. Was there a track in that cross-cut?

A. Yes sir.

Q. Where those two tracks met, what did the floor look like?

A. There was no floor.

Q. What was there where the tracks met?

A. There was a space where you turned the car.

Q. What was in that space?

A. A switch there, that runs the car by from both drifts.

31 Q. Where the switch was, was it dirt on the floor or something else?

A. It was dirt.

Q. How did that switch—you are sure there was nothing there where the tracks met, except the ties or track and the floor?

A. Nothing else.

Q. What did you slip on?

A. On the rail.

Q. What were you walking on? How did you—were you walking between the rails?

A. Yes.

Q. About how far from the chute were you when you slipped?

A. About ten feet.

32 Q. How did you fall?

Judge Sutter: We object. There is no evidence that he fell.

The Court: The objection is overruled.



Judge Sutter: We object; there is not a bit of testimony in the record that he fell.

The Court: There is no testimony that he fell to the ground, but there is testimony that he slipped and fell.

Judge Sutter: No, the testimony in this record is that he slipped on the rail.

The Court: Objection overruled.

Mr. d'Autremont: Read the question.

33 (Question read by the Reporter, as follows: "How did you fall?")

The Witness: Fell against the car, and the car turned over.

Q. What were you doing—cross that out. In what position were you between the time you slipped and the time you fell?

A. Do you want me to get up and show?

Q. Yes?

(The witness now gets up and indicates his position.)

A. I fell right over the car.

Q. Were your feet dragging on the ground as the car was rolling along?

A. No sir, my feet were on top.

Q. Were you riding on the car?

A. I just hung to the car when it caught my fingers.

Q. Did you go down on your knees when you first slipped?

A. No sir.

Q. Did you continue to walk from that time until the car turned up?

A. I could not walk. The car took me with it.

Q. From the time you slipped until the car took you with it, how long a time was it? Did it all happen at once?

A. Yes sir, it all happened at once.

Q. Well, then, what position was your body in during this ten feet from the place where you slipped until the car turned up at the chute?

A. I was hanging to the car.

Q. Were you walking.

34 A. No sir.

Q. What were you doing?

A. I was hanging to the car.

Q. Where were your feet?

A. My feet were up in the air.

Q. When did your feet leave the ground at the chute, or back there ten feet?

A. As soon as I slipped, my feet—I hung right to the car and my feet went up in the air.

Q. Did you slip after you passed over the switch?

A. Before I come to the switch.

Q. Where were your feet as you were passing over the switch?

A. They were on the ground then.

Q. When did they leave the ground?

A. When I slipped.

Q. How fast were you going with the car?

A. Just like I usually do; going pretty fast.

Q. You usually push the car pretty fast?

A. The same as anybody else.

Q. You were pushing the car at the time you slipped?

A. When I slipped the car went by itself.

Q. Did it jerk you?

A. The car held me up in the air.

Q. Did your knees drag?

A. No sir.

Q. Did you say you slipped before you come to the switch?

A. Before I came to the switch.

Q. Now, just tell what you were doing between the time you slipped and when the car upended.

35 A. I don't do nothing.

Q. In what position was your body?

A. It was up in the air.

Q. Was it straight out?

Judge Sutter: Now, if your Honor please, that question would be all right to ask of you or me to state where your body was but of this witness it is different.

Mr. d'Autremont: Anything to bring out the facts.

Judge Sutter: I think counsel wants to bring out the facts, and I want to assist in bringing out the facts. When he says "where was your body," he does not know anything about the time. I know what it is to talk to this witness.

The Court: Answer the question if you can. If you don't understand it you can say so.

The Witness: I was hanging on the car when I slipped, I had to hang on the car, and then the car run around pretty fast, and hit the chute, and turned over.

Q. How were you hanging on the car?

A. I was hanging up to the car.

Q. Had you thrown your lever over that dumps the door?

A. I pushed the car to loosen my hand, and I pulled the car backward.

Q. That is not what I wanted. When did you throw your lever? Ask that much? Did you throw your lever that opens the door of the car?

A. I don't know.

Q. When you are dumping the car, when did you throw your lever to open the door?

36 A. Right in front of the chute.

Q. Did you wait until it gets stopped?

A. I opened before it stops.

Q. But you don't remember if you had opened it at this time?

A. No.

Q. About how far away from the chute do you generally throw it?

A. How far I throw the lever?

Q. Thrust the lever over?

A. Seven or eight feet.

Q. Will you explain again how your right hand was when the car tipped up?

A. My hand was on top of the car, and got caught between the car and the plank.

Q. You mean the plank which are called the protective bars?

A. He says there was no protection plank. Just the plank there, I don't know whether it is protection.

Q. It is a plank between the two timbers on each side of the chute?

A. Yes, it is a plank nailed to both of the timbers.

Q. When you usually dump your car, does any part of the car hit those plank?

A. Yes sir, it hits the plank in order not to go down the chute; for the car not to go down the chute.

Q. You mean that the top plank is hit by the car each time that you dump it?

A. Yes sir.

37 Q. What part of the car does the plank hit each time it dumps?

A. The back part of the car.

Q. Where your hand was at that time?

A. Yes sir.

Q. The back edge?

The Interpreter: The back edge, yes sir.

Q. Ask him if it is the back edge?

A. Yes sir, the back edge.

Q. Whenever you dump your car, how do you dump it?

A. I press the lever to the left, and the car turns up.

Q. Do you have to lift the car from the back to dump it up?

A. No sir.

Q. You just throw your lever and the car dumps itself?

A. Yes sir.

Q. To do that, how fast do you shove your car?

A. It would take two or three minutes to empty the car.

Mr. d'Autremont: What is that?

(Answer read by the Reporter, as follows: "It would take two or three minutes to empty the car.")

Mr. d'Autremont: Ask him that question again.

(Question repeated by the Interpreter.)

A. I go fast.

Q. You never have to pull your car to dump it, do you?

A. No sir.

Q. What stops the car from going down into the chute?

38 A. That plank.

Q. Which plank? Where is the plank that stops the car from going down the chute?

A. Down under ground.

Q. What is the name of that plank.

A. I don't know the name of the plank, but it is as thick as a tie; a railroad tie.

Q. Did you ever hear it called a "bumping plank"?

A. No.

Q. What part of the car does that hit?

A. Front part.

Q. The wheels or the upper part of the car?

A. Wheels.

Mr. d'Autremont: I would like to ask your honor if there is any objection to having this witness demonstrate on this case how he dumps it. I will qualify him by saying that this is exactly the same type of car.

The Court: You are sure it is the exact kind of car?

Mr. d'Autremont: Exactly the same type of car in every respect.

The Court: Any objection?

Judge Sutter: If Your Honor please, there is no objection on the ground that probably there might be some little difference in the car, but a demonstration, in order to be complete before this jury, and not be misleading and unfair probably to the defendant as well as to the plaintiff, would have to have all of the same conditions as they existed there. A track running down the same

39 grade, those cross timbers, that bumping plank at the bottom, and that chute, and the conditions would all have to be the same. In other words it was not the car that caused the accident. If that timber had not been there, the accident would not have happened. For that reason, I would have to object unless the same conditions could be presented to this jury as existed at that time.

The Court: I can't see——

Mr. d'Autremont: Now if bringing the car in and showing the performance in dumping the car. It is identically the same kind of car. I don't think it is the same car myself. It is not the same.

Judge Sutter: It is not the same car.

Mr. Pickett: It is like the car.

Judge Sutter: I have worked in the mine, and I know that no two cars in the mine are the same.

The Court: You will have to show first that it is the same car.

Mr. d'Autremont: I understand that the demonstration is not proper?

The Court: If you can introduce the objects, and show the condition that this particular car was in, you can admit it.

Judge Sutter: I have no objection to that.

The Court: A certain car described by this witness. I think you might use the same kind of car.

Judge Sutter: Before they do that, I want to ask this witness a question or two.

The Court: The other points described by this witness, could not be demonstrated.

Judge Sutter: So far as the dumping of the car is concerned, I can't see how he can demonstrate it with this car, and show  
40 how the accident happened the slipping and the end striking the timber. You can't do that without all of those things being here.

The Court: Do you make any objection to their using this?

Judge Sutter: Yes, it would be defensive matter.

The Court: It seems to me it is defensive matter.

Mr. d'Autremont: I want this witness to show how it happened.

Judge Sutter: I won't make any technical objections to certain demonstrations, and I would not make any objection if the conditions were the same, but to show how the car is ordinarily dumped, I have no objection.

The Court: The Court, at the proper time, will allow any reasonable demonstration, to be made where the conditions can fairly be introduced. I can see how, if this is the same car, if not the same kind of car, without the conditions that existed at that time, would hardly be proper.

Mr. d'Autremont: We are asking to show how this man dumped this car, whether at this chute or any other chute.

Mr. Pickett: The demonstration can be done later. We don't particularly insist on it now.

Q. Where was your left hand at this time, Mr. Tomich?

A. On the side of the car.

Mr. Pickett: Did he say his left hand?

The Interpreter: On the side of the car.

The Court: Do you mean the side or the back of the car?

Judge Sutter: Ask the question that the Court has asked.

41 The Witness: Back, on the left side of the car.

The Court: You mean you had your hands flat against the back of the car, pushing it with your left hand?

The Witness: Yes sir.

Q. What were you pushing it for?

A. Because I had to push it; push the car to get the car to go.

Q. You mean at this particular time you had to push the car to make it go?

A. At the time I got hurt, I had to pull the car back in order to get my hand loose.

Q. Yes, but before you got your right hand caught, where was your left hand?

A. I kept my hand on top, on the left side. On the top of the back end of the car.

Q. How far apart were your two hands when your right hand got caught?

A. About a foot.

Q. Can you explain how your left hand did not get caught?

A. When I slipped my left hand jerked off of the car.

Q. Did you put it back on again?

A. No, I could not.

Q. Well, where was it when your right hand was caught?

A. On my side.

Q. So that when the car hit the dump, you had hold of the car with but one hand?

A. Yes I had hold of it with one hand.

Q. Well, if you had slipped ten feet back, why didn't you let go of the car?

42 A. I could not, because I could not see how far I was.

Q. Where was your head?

A. I could not see.

Q. Where was your head?

A. My head was up. I was looking around for light.

Q. After you slipped.

A. Yes sir, after I slipped.

Q. Will you show the jury just what position you were in before the back of the car started pulling you up in the air, off of your feet as you have stated.

A. I was hanging like that to the car. (Witness now indicates his position.) And my feet slipped and dragged with the car.

Q. How far did it drag you?

A. About ten feet.

Q. Were your knees bumping the ground?

A. No sir.

Q. Were your feet dragging?

A. No.

Q. Were you walking?

A. No, I was hanging.

The Court: Do you mean you were hanging on to the car with your feet off the ground?

The Witness: Yes sir.

Q. How high is the car?

A. About four or five feet.

Q. Show about on your body how high it is.

A. About there. (Indicating the waist line.)

Mr. Pickett: Turn around to the jury.

43 The witness turns to the jury and indicates his waist line.

The Court: How much longer will your examination be of this witness?

Mr. d'Autremont: As soon as I can find out how this happened. I haven't the slightest idea how it happened.

Judge Sutter: Do you expect to find out?

Mr. d'Autremont: I am going to try to.

44 The Court: Very well, we will take our usual afternoon recess at the present time. Gentlemen, we are about to take the usual recess, and the court instructs you not to discuss this case

among yourselves or with any other person, and you will not make up your mind in regard to the merits of the case until you have all the evidence and the instructions of the court before you. You will be excused until called.

At the hour of 3:00 o'clock P. M. the court took a short recess.

3:20 o'clock p. m.

The court reconvened at this time after the adjournment. The plaintiff present in person, and by Judge Sutter his counsel, and the defendant by Mr. d'Antremont, and Mr. Pickett as its counsel, and the jury in the jury box, and all parties announcing themselves ready to proceed, the hearing of the cause was resumed as follows:

The Court: Do the parties waive the roll call?

Mr. d'Antremont: Waive the roll call.

The Court: All right, let the record show. Proceed with your cross-examination.

45 FRANK TOMICH, Plaintiff, being called as a witness in his own behalf, and having been duly sworn according to law, resumed his testimony through the interpreter, as follows:

Cross-examination continued.

By Mr. D'Antremont:

Q. Mr. Tomich, can you tell again just what you did just when your fingers were caught?

A. I pulled the car with my left hand, trying to loosen my right.

Q. What did you push against with your left hand?

Judge Sutter: Now, we object; he didn't say he pushed. He said he pulled.

Q. What did you brace yourself against to pull the car with your left hand?

A. With my left hand and my leg. I braced myself with my leg and pulled.

Q. What did you press your leg against?

A. The middle of the car.

Q. Then you pulled the car down?

A. Yes.

Q. Did it come back on to the truck?

A. Yes sir.

Q. How did you leave the car?

A. The car went to the chute, and I left it there.

Q. Was the car level or upended when you left it?

A. I don't know.

Q. About how long would you say you were held up there by your fingers being caught?

46 A. Around about twenty minutes.

Q. Then your fingers were caught between the protection bar and the end of the car for about twenty minutes?

A. Yes sir.

Q. You are sure of that, are you?

A. Yes sir.

— Did you call out when your fingers were pinched?

A. I did, but nobody heard me.

Q. Then what did you do after you released your fingers after you had been held there for twenty minutes?

A. I fell down and I stayed there for about nine or ten minutes.

Q. You are also sure of that fact, are you?

A. Yes sir.

Q. You are just as sure of that fact as you are that you can't work at this time?

A. Yes sir.

Q. Do you remember who it was that you first saw?

A. I saw a man, but I don't know who he was, and he went away.

Q. Did he leave you when your fingers were crushed without helping you?

A. He didn't help me; he went away.

Q. Do you remember who he was?

A. Yes sir.

Q. Who was he?

A. Mike Madee.

47 Q. Did you call out to him?

A. No sir.

Q. Didn't you tell him your fingers were hurt?

A. Yes, I told him. He looked at them and he went away.

Q. Who was the next man you saw?

A. The shift boss.

Q. Mr. Murphy?

A. Yes.

Q. Where did you see him?

A. On the switch.

Q. Right there at the chute practically?

A. In a drift.

Q. How far from the place where you were hurt did you first see Mr. Murphy?

A. Ten feet.

Q. You know a number of words in English, do you not?

A. A few.

Q. Did you walk—how far did you walk with Mr. Murphy?

A. As far as the station, and he tied my hand there, and sent me on top.

Q. But you didn't see Mike again from the time you first saw him and he went away?

A. He took my bucket; he took my bucket out.

Q. He took your bucket out?

A. This fellow Mike took my bucket out.

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Q. Did he go along with you to the station?



A. He came after.

Q. Then Mike did not walk away from you after he saw your fingers were hurt, did he?

A. Yes sir.

Q. How long was it between the time that you were hurt and you saw Mr. Murphy?

A. About five minutes after I got hurt.

49 Q. Was it five minutes after the twenty minutes that you hung at the car?

A. He says after I took my fingers out, I was down on the ground for about ten minutes, and about five minutes after that the shifter came.

Q. So that it would be about thirty-five minutes, counting the twenty minutes that you hung by your fingers, and the ten minutes you stayed on the ground, and the five minutes before Mr. Murphy came?

A. Yes sir.

Q. That is right?

A. Yes sir.

Q. When did you go to work after the accident?

A. About twenty-four days.

Q. Did you see Mr. Roscoe before you went back to work?

Judge Sutter: Now we object to that as immaterial.

The Court: The objection will be sustained.

50 Q. Did you see Mr. Roscoe after you went back to work?

Judge Sutter: We object to that as immaterial, incompetent and irrelevant.

The Court: Objection sustained.

Q. When was the first time you did see Mr. Roscoe?

Judge Sutter: We object to that on the same ground.

The Court: The objection will be sustained unless the materiality should be shown. You didn't mention Mr. Roscoe's name in the direct, did you?

Judge Sutter: No.

Q. Who acted as interpreter between yourself and Mr. Sutter, Judge Sutter?

Judge Sutter: I object to that as immaterial.

The Court: Objection sustained.

Q. What have you been doing since the time you returned to work, Mr. Tomich?

A. Nothing.

Q. What do you do all day long?

A. I can't do nothing; my hand pains me.

Q. Do you help about the house any?

A. No sir, I can't.

Q. Do you help your wife at all?

A. No sir.

Q. Where do you get your money to live on?

Judge Sutter: We object to that as immaterial.

The Court: Objection overruled.

The Witness: Why, the grocers hold me up.

Q. Do you mean—what do — mean by the grocers holding you up?

51 A. I mean that the men that run the grocery stores is trusting me for the groceries.

Q. Has he ever sent you any bill?

Judge Sutter: We object to that as immaterial.

The Court: Objection sustained.

Q. Has the meat men trusted you since this accident?

Judge Sutter: We object to that as immaterial.

Mr. d'Autremont: I have the right to find that out.

The Court: The objection is sustained. It is legitimate to cross examine this man as to his occupation. but I think that is going further than the original examination.

Q. Does your wife do any work to support the family.

A. No sir.

Q. Where do you live?

A. Upper Lowell.

Q. Do you own the house?

A. It is my house, but I owe on it.

Q. Since the time of your accident, have you tried to work at all, except that one day when you went back to the Cole shaft.

A. No sir, only that one time.

Q. Have you ever tried to do any hard work since the date of your injury?

A. I could not do it.

Q. Have you tried to do any hard work since the date of your injury?

A. No sir.

Q. Do you know then that you could do any hard work if you did try?

52 A. No sir, I could not.

Q. Who chops wood at your house?

Judge Sutter: We object to that as immaterial.

The Court: Objection overruled.

Q. Who chops the wood at your house?

Judge Sutter: We object on the further ground that it does not show that they chop any wood at their house.

Q. Do you use gasoline at your house?

The Court: The question may be answered.

The Witness: I buy my wood already chopped.

Q. Since the time of your accident, have you tried to take hold of anything with your right hand?

A. I did, but I can't hold anything heavy.

Q. Did you ever try to hold anything light?

A. I did, but I could not hold it.

Q. Did you ever come back to the company and ask for a light job until your right hand got strong?

Judge Sutter: We object to that as immaterial. He is not compelled to ask for a light job.

The Court: Objection sustained.

Q. Did anybody ever tell you not to work until this trial was over?

Judge Sutter: I object to that as immaterial.

The Court: Objection overruled.

The Witness: No sir.

Q. How do you intend to pay your bills?

Judge Sutter: We object to that as immaterial.

The Court: Objection sustained.

Q. What do you intend to do the rest of your life?

Judge Sutter: We object to that as immaterial and irrelevant.

53 The Court: Objection sustained.

Q. Have you been unable to sleep lately?

A. Last night my hand pained me until I could not sleep.

Q. That is what caused you that pale complexion, is it?

A. That is my natural color.

Q. You haven't lost any good color from loss of sleep have you?

A. No sir.

Q. Have you been to the doctor since you were examined by Dr. Bledsoe, and the Queen doctor, and Dr. Patton?

Judge Sutter: We object on the ground that he has never been to a Queen doctor.

Mr. d'Autremont: He testified to that.

The Court: Objection overruled.

Judge Sutter: We withdraw the objection.

The Witness: Yes sir.

Q. Who?

A. Dr. Hawley.

Q. When was it that you saw Dr. Hawley?

A. The month of June.

Q. About what time?

A. 1915.

Q. Have you been to any doctor since you saw Dr. Hawley?

A. Yes, I was to see some Queen doctor.

Q. When was that?

A. I don't know; I forget.

Q. What Queen doctor, do you know his name?

A. No sir.

Q. Where did you see this Queen doctor?

54 A. In their dispensary.

Q. Double up your right hand?

(The witness doubles his right hand as requested.)

55 Q. Now you say, Mr. Tomich, in pushing your car, that you threw the lever about seven feet from the chute?

A. Yes.

Q. Do you know if the bumping board on the ground was broken by that car hitting it at the time of this accident?

A. I don't know.

Q. Did you ever, when you dumped your car reach down and dump it from underneath?

A. No sir.

Q. What does the word "Top" mean?

A. Means on top.

Q. It means the reverse from "bottom"?

A. No.

Q. Do you know what the word "catch" means?

A. No sir.

Mr. d'Antremont: Have you any objections?

Judge Sutter: I don't know.

(Mr. d'Antremont hands Judge Sutter a card.)

56 Q. I ask you, Mr. Tomich is that is your writing?

A. No sir.

Q. I will ask you, Mr. Tomich, if that is your signature?

A. No sir.

Q. What is the name of your wife, Mr. Tomich?

A. Katie Tomich.

Q. Is the name of your daughter Marie?

A. Marie.

Q. Is the name of one of your sons Lee?

A. Yes sir.

Q. What is the name of that child? (Indicating child present in the court room.)

A. His name is Joe.

Q. You knew which one I was pointing to when I was pointing to Joe?

A. No sir.

Q. You are positive that is not your handwriting? (Indicating writing on a card.)

A. Yes sir.

Q. Do you know whose handwriting that is?

A. No sir.

Q. Never saw that card before?

Judge Sutter: For this case, he can ask him one question and find out all about it. He can't either read or write.

Q. Have you seen Mr. McDonald since the time of this accident.

57 A. I have seen him, but I never spoke to him.

Q. Did you see him in Bisbee?

A. No, I saw him in Lowell.

Q. Who was with you when you saw Mr. McDonald?

A. I was alone.

Q. Who is Mr. McDonald?

A. He is a Texan.

Q. Where did you know Mr. McDonald?

A. I got acquainted with him in the mine.

Q. Did he work on the same level with you?

A. Yes sir.

Q. Was he the man awhile ago you called Mike?

A. Yes sir.

Q. He was the man you saw in the drift at the time you were hurt, was he not?

A. Yes sir.

Mr. d'Antremont: I think that is all.

Mr. Pickett: Yes, I think that is all.

58 Redirect examination.

By Judge Sutter:

Q. What kind of a car was it that you were running at the time of this accident?

A. Why, it was an ordinary ore car.

Q. Describe it, as to whether it had handles on both sides or not?

A. The car had one handle.

Q. Where was that handle located? On which side of the car?

A. It was on the left side of the car.

Q. Left side of the car, in front or behind?

A. Behind.

Q. At the time your fingers were caught between the car and the plank, what injury was done the first three fingers of your right hand? Just describe the injury?

A. The car cut my three fore fingers; the tips off the fingers.

Q. How much of the tips?

A. The tips off the fingers, that is all.

Q. When dumping a car in the ordinary course of your work, describe the position of the hind wheels of the car when the body of the car is dumped?

A. The hind wheels are on the ground.

Q. By "on the ground," do you mean on the track?

A. Yes sir, on the track.

Q. That is when you are dumping cars ordinarily, the hind wheels remain on the track?

59 A. Yes sir.

Q. Now, when this car dumped that caused this injury, where were the hind wheels?

A. Up in the air.

Judge Sutter: That is all.

Recross-examination.

By Mr. D'Antremont:

Q. How long did the hind wheels stay in the air?

A. About twenty minutes.

Q. How were the hind wheels when you left the car?

A. I don't know.

Q. Did you look at them at the end of this twenty minutes to see whether they were still in the air?

A. No sir.

Q. What makes you think they were still in the air then at the end of twenty minutes?

A. They were up in the air until I got my hand out.

Q. Then what became of them?

A. I don't know.

Q. Did this car dump up easy or hard?

A. I don't know.

Q. How many times did you have to dump it to find out whether it dumped easy or hard?

A. It dumps pretty fast.

Q. Does the lever go over—did the lever go over pretty easily?

A. Not very easy.

Q. How do you happen to remember that there was but one handle on that car?

60 A. I didn't see but one. If there was any more, I never saw it.

Q. You are positive there was but one handle on that car?

A. Yes.

Q. Did you ever switch that car?

A. No sir.

Q. You only shoved it up and down straight, the drift straight?

A. Yes sir.

Q. How did you ever happen to have occasion—strike that out. Did you ever have occasion to use the handle of the car?

A. I used the handle when I was pushing the car.

Q. Do you use those handles on the side when you push the car?

A. I only use the handles when the car is going at a fast gait before I dumped it.

Q. Then, how did you use the handles?

A. Some kind of a hook on the car you have to unhook.

Q. Did you ever look to see if there was a handle on the left side?

Mr. Kingsburg: He stated there was on the left side.

Q. Was there a handle on the right hand side?

A. On the left.

Q. What held the rings that go over the lever if there was no handle on the right hand side?

A. On that car, the lever was on the left hand side.

61 Q. Oh, the lever flew from the right hand side over to the left hand, is that the way it was?

A. Yes sir.

Q. You are sure of that, are you?

A. Yes sir.

Q. You used that car enough to remember it, that you always threw that lever to your left hand?

A. I used it just that one shift.

Q. Have you talked to your attorneys about that car?

A. No sir.

Q. You are as positive that that lever worked from left to right as you are anything that you have testified to about this accident, are you?

A. Yes sir.

Q. Was there a ring on the left handle of that car that held the lever?

A. Yes sir, there was.

Q. Did you have any difficulty in dumping that car?

A. The last car? Do you mean the last car?

Q. That car; I mean that car?

A. That car, at the time of the accident?

Q. No, at any time; dumping that car?

A. No sir.

Q. Then you dump just as well with your left hand as you do with your right?

A. No, I can't, but that car was made that way, and I had

62 to.

Q. It worked all right, though, at that time, did it?

A. Yes sir.

Mr. d'Antremont: That is all.

Judge Sutter: That is all.

The Court: That is all.

Witness excused.

63 KATIE TOMICH, being called as a witness on behalf of the Plaintiff, and having been duly sworn according to law, through the Interpreter, testified as follows:

Direct examination.

By Judge Sutter:

Q. State your name to the jury.

A. Mrs. Tomich.

Q. Are you the wife of Frank Tomich?

A. Yes.

Q. Do you remember on the—do you remember on the 9th day of November, 1914?

A. Yes sir.

Q. When your husband was injured?

A. Yes sir.

64 Q. Since that time has your husband performed any work of any kind, Mrs. Tomich? Has he worked for any company since that?

Mr. Pickett: Now, let me object to that, Your Honor, the form of that question, before it is answered. It strikes me that it would be proper to have the witness state whether she knows whether

65 or not the plaintiff has worked at any place.

Mr. Kingsbury: All right.

The Court: You had better reframe your question.

Q. Do you know, Mrs. Tomich, since the 9th of November, 1914, whether your husband has had employment in any of the mines in Bisbee?

A. No sir.

Q. He has not?

A. He has not.

Q. Do you know what has been the effect upon Mr. Tomich of the loss of the hand, of the three fingers of his right hand?

Mr. d'Autremont: We object to that, Your Honor, if she is going to state anything that he said to her.

Mr. Kingsbury: We do not want her to say what he said.

The Court: The question is whether she knows. It she knows she can answer the question.

Mr. Kingsbury: Yes, ask her the question.

The Witness: Yes.

Q. What does she say?

A. He was very bad.

Q. State what effect, if any, it had upon his sleep at night?

A. He could not sleep most of the time; he would be up there day time and nights.

Q. State whether or not at times he has made any exclamation of pain when his fingers would touch anything?

A. Yes, a good many times.

66 Judge Sutter: That is all.

The Court: Cross Examine.

Cross-examination.

By Mr. D'Antremont:

Q. You and your husband speak about equally good English?

A. My husband can't speak at all.

Q. How old is the baby, Mrs. Tomich?

A. Three months.

Mr. d'Antremont: That is all.

Witness excused.



67      ED MASSEY, being called as a witness on behalf of the Plaintiff, and having been duly sworn according to law, testified as follows:

Direct examination.

By Judge Sutter:

Q. You may state your name.

A. Ed Massey.

Q. What is your occupation, Mr. Massey?

A. Deputy State Mine Inspector.

Q. Where do you reside?

A. Bisbee.

Q. How long have you been Deputy State Mine Inspector?

A. One year.

Q. What was your occupation prior to your becoming State Mine Inspector?

A. Miner.

Q. How long have you been a miner?

A. Oh, about twelve or fifteen years.

Q. What mines have you worked in?

A. Well, I worked all over Colorado, part of Idaho, California, Arizona and New Mexico.

Q. Did you work in the mines in the Warren District?

A. Yes sir.

Q. What mines did you work in there?

A. Holbrook, Oliver, C. & A., Junction. Nearly all of them.

Q. Now, in the course of your work as a miner, did you ever have occasion to load, run and push cars?

68      A. Yes.

Q. You have observed how that work was done by others, have you?

A. Yes sir.

Q. You fairly understand how cars are loaded, run and pushed?

A. Yes sir.

Q. Just describe to the jury, the manner and usual method of pushing the usual car on the ordinary track?

A. Well, the condition of the track would have a great deal to do with that.

Q. Describe to them about the different conditions of track, and the ordinary method?

A. If the track was clean, a man would not—he would not have to put as much force up against it as he would if the track were dirty. That is, loose rock over the track.

Q. Now, a track that is slightly down grade with a loaded car, describe the position that a man's hand should be in in controlling and handling that car?

A. Well, he would take hold of the top of the car, and just push it along.

Q. If it were down grade, would it be necessary for you to push it?

A. No, you should always keep your hands on the car.

Q. You keep your hands on the top of it, as you say?

A. Yes sir.

Q. Illustrate with that chair, if you can, by getting up and going behind it. Counting that (Indicating) as the rear end of the car.

A. About like that. (The witness takes a chair and demonstrates.)

69 Q. That would be your position?

A. Yes sir.

Q. Suppose the car had handles on it, in pushing the car would you use those handles?

A. No.

Q. Why not?

A. Well, because—several reasons.

Q. Tell the jury what those reasons are?

A. If you took hold of the handles of the car, if there is timbers or anything that is close, they will pull your fingers off. You take hold of that lever where the lever is connected with the handle. When the cars get old, there is motion in this lever and will pinch your fingers between the handle and the lever. Of course, on a new car, it won't do that, but after they get worn, it will.

Q. Then, in a drift, are the timbers the same distance from the track or not?

A. No.

Q. Doesn't it frequently occur that timbers press in towards the track, and if you had your hand on the handle of the car, your fingers would be torn off?

A. Yes sir.

Q. Then, as an ordinary matter of safety, the proper place to keep your hands is the back of the car?

A. Yes, sure.

Q. Usually, in dumping the car, what is the ordinary method?

70 A. A track going down hill, if it is not too much hill, you unlock your car and let it dump itself, but where you have to push it up to the dumping block, you have to throw the lever and then you have to lift your car.

Q. Isn't it a fact on the ordinary car the front end extends further over?

Mr. d'Antremont: We object to that.

Q. Describe how the body of the car is fixed on the trucks?

A. Well, the car is evenly balanced, or most of the cars are evenly balanced. Sometimes you get hold of a few cars that are not. It is according to a man's judgment what kind of a car he wants to put in the mine, but a car should be. A car evenly balanced—that is, the swivel in the center of the car.

Q. Now, in running up to a chute, with the surface of it, or the top of the chute is even or practically even with the track, how would you dump a car ordinarily, or how would you in handling your car?

A. I don't understand your question.

Q. You know how the chutes are in the mine?

A. Yes sir.

Q. You are running a car on the ordinary car track up to your chute, how would you dump it?

A. I would try to keep my hands off from under the chute.

Q. You would try to keep your hands off from under the chute?

A. Yes sir.

Q. Certainly, but how would you dump the car?

A. Just as I say, in the ordinary track, do you mean?

71 Q. Yes?

A. I would unlock it and lift it over. I would not try to throw it over.

Q. Would you have your hand on the back or the top of the car?

A. There is no chute there. I would not have it under the chute.

Q. There is no chute there?

A. You mean dumping into a raise?

Q. Yes?

A. To make my work easy, I would unlock and hit the bumping block, and let the weight of the car throw it over.

Q. Where would your hands be?

A. I would have my hands on the top of the car unlocking it. The chances are, I would have one on the end.

A. One on top of the car, and one to unlock it?

A. Unlock it, yes sir.

Q. Now, with the track slightly down grade, you are an expert miner and understand all of those things, a man pushing a car on a track that is slightly down grade, a loaded car, at the ordinary rate of speed, and he slips on the rail of the car, what would be his position if he would slip? Would his hands still remain on the car, or not?

Mr. d'Antremont: I object to that as not being an expert question, a question to an expert.

The Court: Objection sustained.

Q. What are the handles put on cars for, Mr. Massey, ore cars?

72 A. To generally, turn the cars.

Q. Explain—get up and explain to the jury, using the back of the chair as an illustration.

A. Well, if you are coming to a turn sheet, if it is not too hard to turn it, going too fast, you catch the handles, one handle and swing it, or if you are going to make a turn, a hard turn, you take hold of the car, with your shoulder up against the car, and swing it like that (Indicating), but if it is an easy turn, you swing it with your handle. If you want to hold the car back, you make it grab or release. You take the car like that (Indicating) and make the wheels cramp on the track.

Q. Ordinarily, in pushing a car, you don't have hold of the handles?

A. No.

Q. You have your hands on the back of the car?

A. On top of the car.

Judge Sutter: That is all.

## Cross-examination.

By Mr. D'Antremont.

Q. Mr. Massey, you say in pushing a car on the track, it would depend on the car and the condition of the track?

A. Yes.

Q. It would also depend on how well the wheels are greased?

A. Sure.

Q. It would not depend on any particular condition?

A. No sir.

73 Q. It would depend upon all the combined circumstances?

A. According to how heavy the car is loaded.

Q. Now, in a straight chute, as you say, you never have any need of using the handles of the car?

A. No sir.

Q. Did you ever, in all your experience in mining in New Mexico, Colorado or Arizona, ever see a mining car which dumped from left to right?

A. What is the question?

Q. In all your experience in Colorado, New Mexico, and Arizona did you ever see a mining car which the lever threw from the left side to the right?

A. Not as I remember. I have seen several different kinds of car.

Q. You never seen that particular type?

A. It is a right handed car.

Q. You never saw a left handed car, did you?

A. Not as I remember.

Q. Now, in dumping the car—strike that out. In pushing the car in the ordinary course of mining, where your hands, as you said, are this way (Indicating) or is it a safer way to put your hands on the back of the car this way (Indicating) and pull it straight up? (The attorney now demonstrates on a mining car that has heretofore been brought into the court room.)

A. You can't push a car like that.

Q. You can't?

74 A. No sir, holding your hands out like that. All the weight is against your wrist. Then you can't hold your hands down on the car.

Q. All men don't work alike?

A. Isn't your hands up over the top of the car.

Q. That way? (Indicating.)

A. That is about four inches wide, and the car is about an inch and a half wide on top.

Q. Suppose the ore is loaded up on top of the car, would that be a proper position for your hands?

A. Yes, you would have the palm of your hand against the back of the car.

Q. It is the way a man happens to take hold of a car; it is according to whether the car is level full?

A. Oh, if the car were loaded up even with the top, you would not get your fingers down over the edge of it.

Q. You would not?

A. No, I don't think I would run my hand down in muck to get hold of it.

Q. You—do you consider it the best practice to throw your lever six or seven feet before you get to the chute?

A. Well, the condition of the track has a great deal to do with that.

Q. Assuming that the track was in good condition, and all things being equal, would you throw your lever before your car came to a stop?

A. I would.

75 Q. That would necessitate your reaching down?

A. Yes sir.

Q. Would you consider that a safer way?

A. No, I would not see any difference in it.

Q. Did you ever hear of a man catching his fingers between the back of the car and the chute bar, protection bar across the top, causing the car to be up-ended quick when it hit the bumping board at the bottom?

A. I never heard of a man's catching his fingers.

Q. You never?

A. No, I did not.

Q. You never heard?

A. You mean the guard rail?

Q. Guard rail?

A. No, this guard rail, according to law, should be under four feet.

Q. In height?

A. In height, and when the car upended his fingers would be above the end.

The Court: You mean the guard bar would be more to the side of the car?

The Witness: No. You take a car that high (indicating), the guard rail, put it four feet, and when the car comes up, your hands would be above the guard rail.

The Court: The part that you clutched with your hands, would not hit the guard rail?

The Witness: No sir, if it is put in according to law.

76 Q. If the car upended, and went over that way (indicating) it could not possibly hit any guard rail?

A. Probably throw over in there.

Q. It could not go past it?

A. No, I don't think you can.

Q. Most cars, you say, are evenly balanced?

A. I mean the make of the cars are supposed to be evenly balanced. A car on the ordinary track, going along, you can unlock your lever and it won't tip over. The weight, you hold with your hands, going along on a level track.

Q. Would you consider it at all necessary for a man, in dumping his car, to go up against the chute?

A. It would depend on how high the chute board is.

Q. No matter. Do you ever consider it necessary for a man to catch it?

A. No sir.

Q. You never saw a man catch his fingers in there?

A. No sir.

Q. It would not be regular for a man to catch his fingers there?

A. No.

Q. As an expert miner, do you see any necessity for a man, pushing his car, in the ordinary course of business, to slip upon the rail?

A. That is according to the condition of the drift where he is working.

Q. Provided it is not wet. Dry runway, the dirt even with the ties, is there any necessity for a man to slip?

A. You can't tell; he is liable to trip.

Q. Is it not owing to the condition or conditions of the mines?

A. Lots of mines the- are not hard.

Q. A dry drift, and level track, timbered, and ties even with the dirt, is there anything in that situation to require a man to slip upon the rail?

A. Not necessarily, but he is liable to slip on the rail.

Q. If he does slip, is it due to any condition of the track or ties?

A. If it is perfectly smooth, I would not see any.

Q. It would be due to the unfortunate condition of the man rather than the condition or conditions of the mine?

A. Yes sir.

Redirect examination.

By Judge Sutter:

Q. Isn't it due to the condition of the employment that he is employed in at the time he slips?

Mr. d'Antremont: That is a conclusion, Your Honor.

Judge Sutter: This man is an expert.

The Court: Go ahead.

78 The Witness: As I say, he is liable to slip on the rail. The rail is perfectly smooth, and if a man steps on the rail, his foot is liable to slip.

Q. Now, it is necessary, in the first place in pushing a car, to have a car?

A. Yes sir.

Q. Necessary, in the second place, in order to push that car in the mine, to have a rail?

A. Yes sir.

Q. And then necessary to be behind that car to push it with force?

A. Yes sir.

Q. And doing so you necessarily stretched out pushing it?

A. Yes sir.

Q. And your feet, you can't watch and see where they are going?

A. No, not all the time.

Q. Therefore, you can put your foot on the rail and slip, can't you?

A. Yes sir.

Q. And that would be due to the condition of the employment, wouldn't it?

A. Yes sir.

Q. Now, Mr. Massey, Mr. d'Antremont has asked you to describe about dumping a car where you voluntarily dump the car in the chute, but suppose a car moving along at the average rate of speed that ore cars are run, without releasing the lever runs up there and hits the dumping board or rail at the bottom, and the car dumps itself without the lever being released, and a man  
79 tries to hold it, and holds his hands on the top of the car, and the guard rail is five feet high, what would be apt to be the result?

A. Well, the back end of the car would raise, and he could not hardly turn loose from the car, because it is kinda second nature to try to hold your car down, and keep it from dumping.

Q. And his hands would be on the back of the car naturally?

A. If he was pushing it by holding to the top.

Q. And where would the hind wheels be? Would they remain on the track, if the lever was not released?

A. When the front wheels hit this dumping block, the back wheels, if the car is not locked—if the car is not unlocked, the wheels and the bed and all will raise up off the track a little bit, according to how high it raises, according to how fast it is going.

Q. And a man hanging on to the car would go up with it?

A. His hands would go up, and if it goes up far enough, he will go clear up.

Q. And if the guard rail is high enough, his hands are apt to be caught between the car and the guard rail?

A. It is according to where the guard rail is. It is liable to catch his head, if it goes over far enough.

Q. What is the weight of those ordinary cars empty?

A. Anyways from two thousand to twenty-five hundred pounds, I should judge. I mean the C. & A. Company's cars. The Copper Queen Company's cars in Bisbee, they are lighter; they are smaller.

Judge Sutter: That is all.

80 Recross-examination.

By Mr. d'Antremont:

Q. You can't watch your feet, but you can pretty well tell where they are going?

A. I don't know.

Q. You don't have to look at your feet?

A. You suppose the track is in good condition.



Q. I am not talking about the track. In ordinary walking, you don't know where your feet are?

A. No.

Q. In walking down the track, you would know where your feet were without watching them?

A. I don't know that. I would know where they are at.

Q. Is it a necessary condition every time a man steps over a track to slip on it?

A. No, not every time.

Q. It does not necessarily follow that the track, because he walks on it he will fall?

A. If the track was wet.

Q. A dry track?

A. A dry track, no, it is not necessary to slip on it.

Q. The weight of your car would depend on the kind of cars?

A. Yes sir.

Q. There is no general rule?

A. There is no general rule of the capacity of the cars.

Q. If a man fell ten feet away from the chute, would you say, in the ordinary course of events, he would be dragged by one hand and be yanked up in the air?

81 A. No, I don't say that.

Q. In the due course of mining, would that be considered usual?

A. If your car is going along slow and you trip, you will naturally hold on to this car, and it will pull you down in the center, and you can pick yourself up while holding on to the car, and the car does not get away from you.

Q. It would all depend where the man catches his fingers and where the bar is. There is no general rule?

A. No, every accident happens different.

Mr. d'Antremont: I guess that is all.

#### Examination by the Court:

Q. If I understand you correctly, where these cars are dumped is a guard rail or a bar put across somewhat in this position?

A. Yes sir.

Q. And in dumping this at the chute, it comes along and strikes the bumping board at the bottom, and the dumping board flies up in this manner, and dumps the car?

A. Yes, sir.

Q. Is it the purpose of this to keep the car from going on over?

A. It has two purposes. A guard rail to keep the men from walking into the chute, and keeping the car from dumping over.

Q. You said something about the height to erect the rail?

82 A. Yes sir, under the mining code, it is three and a half to four feet.

Q. If that guard bar has the height specified by law, and one of the ordinary mining cars dumps, either by the lever being thrown,



or by dumping or throwing the whole car over, suppose the lever is not thrown, is it possible for a man to have his hands on the back of his car and still strike that, or will it be impossible?

A. Well, it would depend on the condition of that guard rail, whether it was higher than the legal height.

Q. I am assuming that the height is regular as provided by the mining rules?

A. No, I don't think it will, Judge.

Q. The guard rail will strike further down on the body of the car?

A. Yes sir.

Q. Is that the idea?

A. Yes sir.

Q. So that if his hands should strike the rail, the rail would not be the height regulated by law, is that the idea?

A. Yes, sir, that is the idea.

The Court: I understand exactly the condition in the mine, but some of the jurors are not miners.

Mr. d'Antremont: If the jurors desire to ask any questions, they may do so.

A Juror: Are you employed by the State of Arizona?

The Witness: State of Arizona.

#### Examination.

By Mr. d'Antremont resumed:

Q. Mr. Massey, is the height of that guard rail regulated by the Code?

83 A. Yes sir.

Q. The statute I have in my hand?

A. I never looked at it in there. I have a little pamphlet called the Mining Code.

Q. Are you sure that that cross bar refers to a chute, or might it refer to a shaft?

A. It refers to any opening.

Q. Any opening?

A. An opening in the stope that a man is liable to fall into or walk into.

The Court: I think Mr. Massey refers to Paragraph 4075?

Q. Mr. Massey, what is a winze?

A. A winze, why it is any place under ground which would be a shaft on the surface, but they call it a winze when it is under ground, sunk under ground.

Q. A winze, then, is a hole?

A. Yes, it is a hole going down under ground. You would not call it a winze if it starts from the surface?

Q. A chute would be a winze?

A. No, a chute would not be a winze.

Q. What is a chute?

A. A chute is where the ore goes into, or waste or whatever it is. It is an opening that you load your car from.

Q. Are you familiar with the mining cars in the C. & A. mine?

A. Yes sir.

84 Mr. d'Antremont: I will ask to bring in the mining car, and have it identified.

Q. Are you familiar with the mining cars used in the Cole shaft?

A. Yes sir.

The Court: Are you familiar with the cars in the Cole shaft?

The Witness: I was not in the Cole shaft, but I have been in and around the C. & A. mine for years.

Q. They are about the same cars?

A. Yes sir, about the same cars.

The Court: They are all about the same kind of car?

Judge Sutter: I will state right now that I don't object to bringing that car in here for this witness to demonstrate it. Of course, I would object to having the plaintiff being bound by it without its being the same, but I don't object to Mr. Massey demonstrating or illustrating his testimony by using it.

The Court: All right.

(The mining car is again brought into the court room, and the witness uses it for the purpose of illustrating his testimony.)

The Court: Would that along there (Indicating a railing in the court room) substantially represent the dump board?

The Witness: It is a little too high.

The Court: This is the relative idea of a dumping board?

The Witness: Yes sir.

85 Q. The dump board might be made of different size timber?

A. Yes sir, but they generally use ties.

Q. You say you could not push your car with your hands in that position? (Indicating.)

A. Oh yes, you could.

The Court: Show the jury the ordinary position of a man pushing a car on a track that is slightly down hill.

(The witness indicates as requested.)

Q. And the car empty? The car loaded?

A. I would put my hands on the car—the ore is up level, which is seldom—

Q. Very seldom?

A. It is very near full up to the top. When you are walking along fast standing, you generally get stretched out like that. (Indicating.) If you are walking along fast, you are standing up like this (Indicating) and then you hold your hands up.

The Court: The natural position which a man takes?

A. Yes sir.

Q. Now, you show how you would throw your lever as you approach the dump?

A. With some of the old cars, you throw it that way. (Indicating.)

Q. You would throw that lever with your right hand, would you?

A. Sure.

Q. So that if you never saw a car that threw from left to right, a man approaching a chute would use his right hand under all conditions?

86 A. I don't see how he could reach over this way. (Indicating.)

Q. In case he threw the lever with his right hand, which hand would naturally be on top of the car?

A. Left.

Q. Would you show how the car would be when it is dumped?

A. How the car would be when it is dumped?

Q. How you would dump a car.

A. Well, if I had it up to the dumping block, I would place this leg up against the back of the car about that way. (Indicating.) That keeps the car from running back.

Q. Show how it is.

A. That was—that leg keeps the car from coming back, and also from raising up.

Q. Now, this chute bar, which you say the law requires to be not more than four feet in height up to the level of the drift, where would that hit the car?

A. It ought to strike the car along about here. (Indicating.)

Q. If the back wheels are upended, would it not be apt to hit the car further back?

A. To keep your car on the track, your bar ought to strike it in here. (Indicating.)

Q. But if the back truck goes off the track, would that not throw this other down?

A. Sure; it is according to how fast you are going the further up this goes, until you get to a certain angle.

Q. It does not follow that the chute bar is illegal as to height because your fingers, on a car of this type, would hit the chute bar?

87 A. No, the chute bar would come about to its ordinary height here. (Indicating.)

Q. Where would the chute bar be?

A. About here. (Indicating.)

Q. Now, if this car had hit the bumping board, about where would the chute bar be?

The Court: Wait until I get the measurements, and then Mr. Massey can illustrate.

Mr. d'Antremont: I don't need the measurements.

The Witness: It is according to where that chute bar is placed. If it is placed square over your bumping board—if this chute block or dump block was directly under the chute guard, or the guard rail, it would strike the guard about here (Indicating) up to along about here. (Indicating.) It is when it is dumped clear over.

The Court: What would be the effect, Mr. Massey, supposing the car did not dump as you have indicated there, but the hind wheels and truck went up with the car, would the chute board or bar strike further back on the car or further forward?

The Witness: Further back that way. (Indicating.) Sometimes those cars don't unlock.

The Court: I am supposing that it struck the dumping board.

The Witness: The whole truck would strike.

The Court: Then the guard bar would strike further back on the car?

The Witness: Yes sir.

Q. So if the back truck upended far enough, he might readily catch—he might readily hit the back end of the car with the chute board?

88 A. When the car——

Q. Answer "yes" or "no."

A. It might readily hit the back edge of the car.

Q. It might?

A. Yes sir.

Q. And still be at its proper and legal height?

A. Well, it would be owing to the condition of the bumping block, where that guard was placed. If it was placed directly over this bumping block, then after the car gets so high it starts to go down again.

Q. Now, will you trip the car, please.

(Witness does as requested, by tipping the body of the car over.)

Q. Now, will you show the relative position, supposing the wheels were up against the bumping board where the chute bar would be?

A. The chute bar should be right about here (Indicating.) That should be over.

Q. Does the law require the chute bar to be of any particular material?

A. No sir.

Q. Must the top or bottom of it be four feet?

A. The bottom of it.

Q. The purpose of it is, when they say the maximum height of the bottom if it shall not be more than four feet is to keep the car from going over too far?

A. That is the way I understand.

Q. So, if a timber two by six, four feet high plank be nailed across the chute, that would be just as good as a chute bar, provided the lower part would not be more than four feet high?

89

A. Yes sir.

Q. Therefore, if a plank, say two by six or two by twelve were nailed across the chute of the height and type of that chute bar, of the height that is further up?

A. Yes, sure.

Q. So the chute bar would still be in compliance with the law and still might be able to hit further up?

A. Everything depends on the way the car is dumped.

Q. But the chute bar would be nailed of the same timber?

A. Yes sir, but this car, if it was locked and then goes over, this end will strike that square, about.

Examination.

By the Court:

Q. Mr. Massey, if the car strikes the chute bar when the chute bar is two by six or two by twelve or two by sixteen, doesn't it strike the bottom of the bar?

A. I would not say it would always strike the bar. If, when you come out with the car, and it tips over with you, this is liable to hit right square up.

Q. You mean the other end will stand vertically?

A. Vertical. It would hit this side the same as the bottom.

Q. A car in dumping does not always stop at an angle? Sometimes goes straight up in the air?

90 Judge Sutter: The car will stop at this angle. (Indicating.)

Examination.

By Me. d'Antremont, continued:

Q. Let Mr. Massey tell. Now, take a car when it is stopped, some of these levers are loose, and you throw it over there (Indicating), and it does not unfasten the catch in front?

A. Yes. The whole thing will dump if you are going fast.

Q. If you are going at any rate of speed the whole thing will go over with you?

A. Yes.

Q. What angle does it go?

A. Sometimes goes straight up.

Q. Or stop at an angle of forty-five degrees as you have indicated?

A. It will stand on this end of the car.

Q. That is what I mean?

A. It will stand vertical.

Q. The car sometimes dumps so that it will stand practically vertically?

A. Yes sir.

Q. So I ask you again, it is possible for the chute bar to be at its legal and proper height——

A. Yes sir.

Q. —and for a man at the back of the car——

A. Yes sir.

Q. —if the door did not unlock, if the truck upends—Strike that out.

## 91 Examination.

By Members of the Jury:

Q. I would like to know, if your foot would slip, what position would your body remain in?

A. Well, that is according to whether you held on to the car, or whether it pulled you loose from the car, if it slipped a little bit.

Q. Your feet would remain on the ground, would it not?

A. Yes sir, you might catch yourself by holding on to the car. A man does not want to let his car get away from him, especially going down hill.

Q. If a man turns over that way, it would throw a man clear over the car?

A. Yes sir.

The Court: As I understand, Mr. Massey, with a loaded car, there is a weight from two thousand to twenty-five hundred pounds pulling on the man?

The Witness: Yes sir. It is natural for a man, I don't know why he does it, he will hold on to his car invariably. He won't turn loose from it.

Examination continued.

By Mr. d'Antremont:

Q. Do you think it is proper for a man to let his car get to going so fast that he can't control the speed when he is going to the chute?

A. Well, that is owing to the condition of the track.

Q. When the track is in a proper condition?

A. No, it is not.

Q. He should always have the car under control?

92 A. Yes sir.

Q. That is what he is there for?

A. Yes sir.

Q. Is it not true, in the usual condition of things, the track being proper, the car being proper, the runway being proper——

A. Yes sir.

Q. —it would be a man's own fault, letting the car get away?

A. Yes.

Q. Now, we will upend this car.

A. I don't know whether I can or not.

Q. The bumping board hits what part of the car?

A. The wheel. You want the bumping board so that it will catch the wheel there on the flange.

Q. Now, if the car is not froze——

Mr. Sutter: Unlocked.

Q. Unlocked. If the car is not unlocked and hits the protection bar and upends, then the back of the car can't hit the chute bar at the proper height?

A. Yes sir.

Mr. d'Antremont: Do the jurors wish to ask any questions?

Examination.

By Members of the Jury:

Q. Would it depend upon the per centage of grade.

A. The conditions of the track, and the conditions surrounding it.

Q. In order to control the car, you would have to have your hands on the inside in order to hold it back. You could not hold it back if you were up against the car?

93 A. Yes sir.

Q. If a man leaves go of this car and he has an accident and loses the car or lets it get away from him, he does not hold his job any more?

A. Well, that depends on the bosses. The average bosses——

Q. What would be your idea?

Mr. d'Antremont: We do not object to these questions.

Q. I don't think it would have any bearing on the bosses. What we want, if this man has that accident, would it have any effect on his losing his position?

The Court: You want to know the ordinary custom of miners?

94 The Juror: Yes.

The Court: You can ask if there is an ordinary custom in that particular.

The Witness: If this man should let this go and go to that guard rail, the chances are he would be fired.

Q. You mean that is the ordinary custom?

A. The ordinary rule.

Q. It would be to his interest to gain control of his car, and to see that it did not get away from him?

A. Yes sir, and also to his job and also to make a showing.

95 Examination.

By Mr. d'Antremont, continued:

Q. How fast would a car have to go to go through the protection board and bumping board?

A. It is according to what kind of a guard rail is there, and protection bar.

Q. Providing the guard rail and protection bar are in good shape? How fast would a car like this have to be going?

A. According to the weight of the car; according to what it is loaded with.

The Court: It would be a question of the momentum of the car?

The Witness: Momentum of the car.

The Court: And the weight?

The Witness: Weight.

The Court: And the strength of the guard rail all taken together?

The Witness: Yes sir.

Q. And the momentum given by the man pushing?

A. Yes sir.

Q. Now, if a car is going along an ordinary track ordinary and natural on a slight grade, would it be apt to go through the dumping board or guard rail?

A. No.

Q. The guard rail made two by fourteen inches?

A. No.

Mr. d'Antremont: I think that is all.

96 Redirect examination.

By Judge Sutter:

Q. Mr. Massey, can you upend that car without unlocking it?

A. Possibly, yes sir. (Witness upends car.)

Q. Now, show the jury what position—I withdraw the question. Can you illustrate to the jury what position a man's body is in with the car upended to that position, and he holds on to it with his hands?

The Court: Some of the jurors have asked that a four foot measurement be placed on that.

Mr. d'Antremont: All right.

(Four feet in height is measured off.)

Examination.

By the Court:

Q. If you will hold that in the position that the guard rail will naturally occupy with reference to the dumping bar, the dumping bar, as I understand, would strike the car about here. (Indicating.)

A. The dumping block.

Q. The bottom of the guard rail. Suppose the car is upended, if it were four feet high, the car could not go that far?

A. It would kick it back.

Q. It would kick the wheels back?

A. Yes sir.

Q. The edge here, supposing it would be a good size guard rail?

A. I may add this. The guard rail, maybe the guard rail is high enough to let the car go in under. A car does not bump against the guard rail. It goes in under the guard rail.

97 Q. The top of the car?

A. The top of the car.

Q. Is this part (indicating) suppose to go under the guard rail?

A. No sir.

Q. The front end goes under?

A. Yes sir.



Q. The purpose of the guard rail is to catch the car somewhere along there (indicating) and keep it from going on through?

A. Yes sir, and also to upend it.

Q. And if the car dumps, with the hind wheels of the truck leaving the track, the guard rail would ordinarily strike further back towards the back end of this car?

A. Yes sir.

Examination.

By Members of the Jury:

Q. Mr. Massey, what position would that car naturally get in to lift a man off the ground. How, if this is its position, how would it get a man to hold him off the ground?

A. Well, it would depend on the height of the man. It would not pull him off the ground. It is owing to how fast the momentum of the car would pull him. A man my height, it would naturally pull him up with the car, up in the air. It would pull him up off the ground.

Q. If that car was going fast, Mr. Massey, and you were hanging on to it, and it would hit that dumping board and turn over, it would naturally take you up in the air?

A. Yes sir, if I held on to it.

Q. The carman always hangs on to the top of the car?

98

A. Yes sir.

The Court: One of the jurors asked me if there was any evidence as to the condition of this guard rail, and I stated there was no evidence before the jury in regard to the rail.

Judge Sutter: As I recall it, it was about five feet from the ground.

Mr. d'Antremont: Who said that?

Judge Sutter: He may have told me that outside of the courtroom.

A Juror: He said four or five feet.

Examination.

By Mr. D'Antremont:

Q. Mr. Massey, if the guard rail were five feet, would it hit that car at all. Would it have been possible for him to have caught his fingers?

A. If it was five feet, it would hit the guard rail, but there is no position you could put the car in that it would catch it.

Q. Noticing this chalk mark where it is four feet, and supposing the guard rail to be of that width, there would be plenty of opportunity for the guard rail to be the proper height and still for a man to catch his fingers when the car upended?

A. Not four feet. If that is four feet marked there. If you put it five feet, he can catch his fingers.

Q. You understood the question?

The Court: Assuming that the bottom of the guard rail was four feet, and two by twelve, the top of it would be five feet?

The Witness: That is my idea.

99 The Court: He could still catch his fingers?

The Witness: Yes sir.

Witness excused.

CHARLES F. HAWLEY, being called as a witness on behalf of the plaintiff, and having been duly sworn according to law, testified as follows:

Direct examination.

By Judge Sutter:

Q. You may state your name?

A. Charles F. Hawley.

Q. Where do you reside?

A. Bisbee, Arizona.

Q. What is your occupation?

A. Physician and surgeon.

Judge Sutter: Will you admit that the doctor is a physician and surgeon, and qualified to testify as an expert?

Mr. d'Antremont: Yes sir.

Q. Doctor, do you know Frank Tomich?

A. Yes sir.

Q. In the month of June, 1915, did you meet him?

A. Yes sir.

Q. In a professional way?

A. Yes sir.

Q. He called on you, did he?

100 A. Yes sir.

Q. Did you examine his right hand?

A. I did.

Q. Made a careful examination of it?

A. Yes sir.

Q. For how long a period did you have him under your care?

A. I saw him at intervals from June to August, 1915.

Q. Just describe to the jury the condition that you found his right hand in?

A. I found a loss of the hand of the index finger and the second finger at the first joint, and the third finger was taken off a little forward of the first joint.

Q. Describe the general condition of the ends of those fingers as to tenderness or soreness?

A. The ends of the fingers, the first three fingers were very tender. He could not bear any pressure of touching them at all.

Q. Did you ask him any questions about his condition?

A. Yes sir.

Q. What did he tell you?

A. He told me that he suffered continual pain in them.

Q. Did he describe that pain?

A. Yes sir, he said that it felt as if there were pins and needles sticking in the ends of the fingers.

Q. What would you say caused that condition of the ends of the fingers? That is what is it that brings about that condition of the ends of the fingers?

101 A. The nerves. In this case the nerves were caught in the scar tissue covering the ends of the fingers.

Q. What is the result of that?

A. Pain.

Q. Is that pain constant or only at intervals?

A. It is constant. It grows worse.

Q. It grows worse all the time?

A. Yes sir.

Q. What effect, if any, does it have upon the patient's sleep?

A. It is apt to make him wakeful.

Q. Now, with the ends, or with the fingers in the condition that you found the fingers of the plaintiff in, would you say that he was able to work at his occupation of mining and carman?

A. No sir, not without considerable pain.

Q. It would be painful all the time, would it?

A. Yes sir.

Q. Is there any way of relieving that condition?

A. In my opinion, yes.

Q. Tell the jury how that condition can be relieved?

A. Another operation could be done on those fingers, cutting them off a little further back, clipping the nerves very short, making a little larger patch of flesh over the end of the bone.

Q. Now, what would be necessary in performing that operation?

102 A. He would have to take anesthetic, and the operation performed.

Q. And what would be the approximate period that he would be disabled from the use of the hand after the operation was performed?

A. In my opinion, he might be able to go to work in about three months.

Q. In about three months after the operation was performed?

A. Yes sir.

Q. Would that operation be painful?

A. He would be under the influence of an anesthetic and he would not feel it.

Q. After he came out from under the influence of the anesthetic, would there be any pain connected with it.

A. There would.

Q. For what period would that pain last?

A. Until the wounds were healed.

Q. Approximately how long would you say that would be?

A. It is very hard to tell. Those wounds should be well healed in four weeks.

Q. Is there any danger from that operation of blood poisoning or anything of that sort?

A. There is always. Always dangers when a person takes an anesthetic.

Q. Always running a risk when you take an anesthetic, are you?

A. Yes sir.

103 Judge Sutter: I think that is all with this witness.  
The Court: Cross examine.

Cross-examination.

By Mr. D'Antremont:

Q. What risk do you run in taking an anesthetic, doctor, if you are in good shape physically?

A. There is always danger from chloroform or ether or any anesthetic.

Q. You are speaking theoretically or practically?

A. Practically.

Q. How many men have you had die in that condition?

A. Never had one.

Q. Never had one?

A. No sir.

Q. What results have you had that leads you to think there is danger?

A. Those drugs are depressing to the heart.

Q. If a man was a robust man, is there apt to be the slightest effect upon his system?

A. Certainly, he is generally sick; sick at his stomach.

Q. Sick at his stomach when he comes out?

A. Yes sir.

Q. I mean is there any dangerous result from having taken the anesthetic?

A. No sir.

Q. So far as that goes, there is practically no danger?

A. Yes sir.

104 Q. All the results are, a person is nauseated after he becomes conscious?

A. Yes, as a rule.

Q. What is this blood poison, in case the fingers are improperly handled?

A. If the operation is done in an absolutely antiseptic manner, the danger would not be great.

Q. Would you conduct an operation in any other than an absolutely antiseptic manner?

A. No sir.

Q. Did you ever hear of a case in which a competent physician operates on a man and he has any blood poison after the operation?

A. No sir.

Q. So the risk of blood poison is practically negative, if it is properly handled?

A. Yes sir.

Q. Now, did this man talk to you in English when you examined him?

A. Beg pardon.

Q. Did this man talk to you in English when you examined him?

A. Yes sir, broken.

Q. He speaks pretty good English?

A. Yes sir.

Q. You talked to him very generally, without an interpreter?

A. There was always an interpreter with him, but I could understand what he said.

105 Q. He could understand you?

A. Yes sir.

Q. You talked to him about the fingers, and the usual things in regard to that?

A. Yes sir.

Q. Now, can you tell by looking at a man if his fingers are sore?

A. Sometimes.

Q. What does a man look like when his fingers are sore?

Judge Sutter: Do you mean the man or the fingers?

Q. What does a man, his face look like, when his fingers are sore? Is there any expression in his face?

A. Not when I looked at him.

Q. Did this man look like he suffered from the loss of sleep?

A. Not especially.

Q. What are the usual effects of a man losing sleep from pain like shooting needles in his fingers? How does that show in his face?

A. His face would be drawn; his expression would be drawn.

Q. Would it be lack of color?

A. Sometimes.

Q. Eyes look very heavy?

A. Yes sir.

106 Q. Very noticeable?

A. If he lost a good deal of sleep, yes sir.

Q. And if he had those shooting pains constantly, he would be pretty apt to lose sleep?

A. Yes sir.

Q. He would be pretty apt to be haggard and pale?

A. Yes sir.

Q. The way you found those fingers were tender, by looking at them?

A. By touching them.

Q. And then he told you they hurt?

A. Yes sir.

Q. Of course, you know, as a doctor, if you touch a man that is sore, he flinches?

A. Yes sir.

Q. Can you see those nerves?

A. You can't.

Q. It is only a deduction on your part, that those nerves had been in the scar tissue?

A. Yes sir.

Q. And all you know about the tenderness of this man's fingers is what he has told you and what you have observed?

A. Yes sir.

Q. And the flinching?

A. Yes sir.

Q. That could be feigned?

A. It could.

107 Q. If a man were carefully coached, he would know how to do that?

A. Yes sir.

Q. Will you state the condition of this man's ring finger, how much of that was gone?

A. The third finger?

Q. Yes?

A. That was taken off a little forward of the first joint.

Q. Is there any finger nail there?

A. A little bit, yes sir.

Q. How far up a man's arm are these pains apt to go?

A. That would vary in different cases.

Q. Would it in any manner affect a man's arm?

A. Not to that extent.

Q. If he had a powerful left arm, he could work with that as well with that, regardless of his right arm?

A. Yes sir.

Q. Would you say that a man who has pain in his fingers from such a result, could do ordinary house work with his left arm?

A. He could.

Q. He could help his wife about her housework?

A. Yes sir.

Q. About this operation, it would be a very simple operation to trim off those nerves?

108 A. Yes sir.

Q. And what would be the approximate cost of it?

A. Surgeons in establishing their fees a great many times take into consideration the financial condition of the patient.

Q. How much would the fee be if a man came to you?

Judge Sutter: A man in the circumstances of Mr. Tomich?

The Witness: One hundred and fifty dollars.

Q. You would charge one hundred and fifty dollars?

A. Yes sir.

Q. He is a poor man?

A. It is worth it to him.

Q. Yes, it is worth it to him. How much would the time be worth to you?

Judge Sutter: We will object. Doctors do not charge like lawyers. He charges for his knowledge.

The Court: Objection sustained.

Q. And then you say after four weeks at the most, the pain would be entirely gone?

A. The wounds would be healed.

Q. And at the most, after three months, he could return to work?

A. Yes sir.

Q. And thereafter he would not suffer the slightest degree of pain?

A. If the operation was performed.

109 Q. If it was properly done?

A. Yes sir.

Q. And proper result obtained, and done under the proper anti-septic conditions?

A. Yes sir.

Q. He might then after that work and use both of his hands in the ordinary course of work?

A. Of course the functions of that hand would be limited by the loss of the ends of the fingers.

Q. It would be slightly impaired?

A. Yes sir.

Q. But with the exception of that, a man would be able to do all the duties of a miner or a carman without any pain or injury or trouble?

A. Yes sir.

Mr. d'Antremont: That is all.

Redirect examination.

By Judge Sutter:

Q. You mean he could do all those duties if he could get a job with his hand in that condition, don't you?

A. Yes sir.

Q. Do you know what the rule is in the Warren district about men with maimed hands getting a job?

110 Mr. d'Antremont: I object, unless he shows that it is the rule.

Q. Do you know anything about that rule?

A. I do.

Q. What is it?

A. A man can't get a job in the mines.

Q. A man can't get a job in the mines with maimed hands or fingers?

A. No sir.

Q. Then this man would not be in a position, with his fingers the way that they are now, to get a job over there under the present rule?

A. No sir.

Q. You were asked about nails remaining on the ends of the fingers, the one finger of this plaintiff's hand. I will call the plaintiff forward.

55

(The plaintiff is called over to the witness chair.)

Mr. d'Antremont: We object to an examination by the doctor at this time.

The Court: On what ground?

Mr. d'Antremont: On the ground it is made under protest. The jury have had an opportunity to see this man.

The Court: Objection overruled.

111 Q. Doctor, I will ask you to look at the first three fingers of this plaintiff's hand, and state whether or not the nails left there or any portion of the nails there are any benefit to the plaintiff's hand?

A. There is just a slight end of the nail on the third fingers. (The witness now makes examination of the plaintiff's hand.)

Q. Is that of any benefit, or will it be of any benefit to the plaintiff?

A. None at all.

Q. If another operation would be performed, would it be necessary to remove that nail?

A. Yes sir, I would remove it.

Q. Look at the second finger, at the nail remaining there.

A. There is none.

Q. Look at it carefully. What is that? (Indicating.)

A. I would say that is scar tissue.

Q. Scar tissue? Look at the end of the first finger carefully and see if there is any nail there?

A. I would say that was scar tissue.

Q. Scar tissue?

A. Yes sir.

112 Q. Then the portion of the nail that is left on the third finger is useless to him, is it not?

A. Yes sir.

Q. Is it not a fact that it is a detriment to him? Would catch on things?

A. Yes sir.

Q. And should have been removed, shouldn't it, at the first operation?

A. Yes sir.

Judge Sutter: That is all.

A Juror: According to your opinion, if I am permitted to ask.

The Court: Go ahead and ask the question.

Juror: According to your opinion, do you think this operation is performed right?

Judge Sutter: I avoided that myself. There is no objection to the juror asking it.

Juror: You stated in your testimony—

Judge Sutter: Answer the question, doctor.

The Witness: I would not have taken the finger off at the joint and made a little thicker pad over the end of the bone, and also slipped those nerves a little shorter.



## Examination.

By Members of the Jury:

Q. Well then, according—What we are trying to get at, according to your belief, if this patient had come before you instead of the doctors that he went to—you are a private physician, I presume?

A. Yes sir.

Q. What I would like to get in my mind, according to whether this patient come to you, you would have performed a different operation, would you?

A. No sir.

Q. You would have performed the same identical operation that he now has?

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A. Yes sir.

The Court: Would you have performed it in the same manner?

The Witness: Not quite, no sir.

The Court: Understand, Mr. Juror, these are delicate questions to ask one physician in regard to another.

Q. What I was trying to get at, he stated that this witness, if his fingers were cut different, he could use them to a better advantage.

Judge Sutter: That is a fact, isn't it doctor?

The Witness: Yes sir.

## Recross-examination.

By Mr. D'Autremont:

Q. Don't our finger nails catch on things?

A. Yes sir.

Q. So far as catching on things it would be better if he had no finger nails?

A. No sir.

Q. They help protect us to some degree?

A. They help us in picking up small objects.

The Court: Is that all?

Mr. d'Autremont: No sir.

Q. Where have you learned this rule in the Warren District that would prevent a man from getting a position if his fingers are in the condition this man's are?

A. I have heard it mentioned by the surgeons representing the mining companies.

Q. Do they hire the men?

A. No sir.

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Q. All they do is to pass upon their physical condition at the time?

A. Yes sir.

Q. You never talked to any foreman of the mines who hired men?

A. No sir.

Q. You never heard it stated that if a man worked three years for the company and had his fingers pinched off he could come back to his old work?

A. I have heard the man say so.

Q. If he had been employed by the company a long time?

A. Yes sir.

Q. Did he work for the C. & A. Mining Company?

A. I could not say.

Q. Did he work for the Superior & Pittsburg Copper Company?

A. I don't remember.

Q. Do you know that each particular shaft has its foreman who does the hiring of the men for that particular shaft?

A. Yes sir.

Q. Do you know that their word is final on hiring the men?

A. I don't know that.

Q. You don't know that?

A. No sir.

Q. Would you be sure that that was a fact if a man who had been employed and had been so injured could never obtain a position in the Warren District again?

A. No sir.

115 Q. You didn't say that?

A. No sir.

Q. This was merely a conversation that you heard?

A. Yes sir.

Q. Do you know at this time there are men employed in the mine whose fingers are off.

A. I don't know of any.

Q. Do you know it to be a fact that there are no such men?

A. No sir.

Q. Did you ever make an operation in your life, doctor, that might not have been done differently?

A. Yes sir.

Q. And which, after a certain result had developed, another doctor examining that same patient, might say, after it was all done, had you done so and so, the result might be different?

A. No sir.

Q. Do you say it is a mark of incompetency on the part of the surgeon?

Judge Sutter: I have not said it was incompetency. I realize that any doctor, no matter how good he would be, might make a mistake, the same as a good lawyer, and I really ought to object to it.

The Court: Do you object?

Judge Sutter: No, I won't object.

Q. Would you say, in any way, this man's fingers show the result of incompetent treatment?

A. No sir.

116 Q. If Dr. Shine and Dr. Bledsoe examined this man and said everything had been done properly to this man, would you say that perhaps they were wrong?

A. I would.

Q. You would say that something would still be wrong?

A. Yes sir.

Q. At the time this operation was done which made this result, if all practical care and attention had been given in the practice of surgery, unforeseen results could be obtained?

A. They could.

Q. And a man doing things in a proper and skillful manner might at times obtain unsatisfactory results?

A. Yes sir.

Q. And it would be no sign of incompetency or lack of skill.

A. No sir.

Q. And if—take the ends of a man's fingers might—fifteen months afterwards, might the same results have been obtained?

A. If I had done the operation?

Q. Yes sir.

A. Yes sir.

Q. So it can't be said it would be at all a lack of skillful application?

A. No sir.

Q. But at this time it is easy to see and say what might have been done?

A. Yes sir.

Mr. d'Autremont: That is all.

117 Redirect examination.

By Judge Sutter:

Q. But was not done?

A. Yes sir.

Q. In other words, you would say that there was probably a mistake made here, instead of incompetency? The same mistake that you or any other surgeon might make?

A. Yes sir.

Q. But the result of that mistake still exists?

A. Yes sir.

Recross-examination.

By Mr. D'Autremont:

Q. Which might be removed by another operation?

Judge Sutter: We admit that.

The Court: So I understand.

Witness excused.

118 H. H. HUGHART, being called as a witness on behalf of the Plaintiff, and having been duly sworn according to law, testified as follows:

Direct examination.

By Judge Sutter:

Q. You may state your name.

A. H. Houston Hughart.

Q. Where do you reside?

A. Tombstone, Arizona.

Q. What is your profession or occupation?

A. Physician and surgeon.

Judge Sutter: Do you admit that he is competent to testify as an expert?

Mr. d'Antremont: Yes sir.

Judge Sutter: Let the record show that it is admitted he is competent to testify as an expert.

Q. Doctor, night before last, on the 14th I think it was, 14th of February of this year did you examine this man sitting over there, Frank Tomich, the plaintiff in this case?

A. Yes sir.

Q. Examine his right hand?

A. Yes sir.

Q. Did you examine that right hand again last night?

A. Yes sir.

Q. Gave it a careful examination?

119 A. Yes sir.

Q. The first time you examined the hand, there was no interpreter present, was there?

A. No sir.

Q. Last night was there an interpreter present?

A. Yes sir.

Q. And did you discuss the hand with the plaintiff through an interpreter last night?

A. Yes sir.

Q. From your examination, and from your conversation with the plaintiff, I will ask you to describe what the condition of that hand was as you found it?

A. Why, he had had the index, the middle and the ring finger, the first three fingers on his right hand amputated at the first joint, they call it.

Q. Was the third finger amputated at the first joint, or just beyond the first joint?

A. They were all amputated about the first joint, because they all had some remains of the nail on them.

120 Q. The third finger was not amputated——

Mr. d'Autremont: Just a moment.

Q. Now describe the condition of those fingers?

A. The nerves have been incarcerated in the scar tissue, the nerve ends, and have left his fingers, in the condition of what they call nervous neuritis.

Q. And what is the result of that condition of the patient?

A. Causes him to suffer from neuralgia, and makes the ends of his stumps sensitive and painful. He can't do anything with it. If he touches anything it goes through him like an electric shock or nerve pain.

Q. And describe that pain?

A. Well, I never had it, but the text books describe it as a very severe pain.

Q. Did you touch the end of his fingers?

A. Yes sir.

121 Judge Sutter: I will call the plaintiff forward.

(Plaintiff comes forward to near the witness chair.)

Q. Now, just take the plaintiff's right hand.

(The witness takes hold of the plaintiff's right hand.)

Mr. d'Autremont: I object to further examination.

The Court: Overruled.

Q. And show the jury what effect touching the ends of those three fingers has on the plaintiff.

Mr. d'Autremont: I object to any further demonstration. He has had that two or three times.

The Court: Objection overruled. Proceed doctor.

Q. Demonstrate to the jury, doctor.

A. The ends of his fingers are so sensitive that anything touches them, although it be the slightest touch, he involuntarily, the muscles involuntarily contract in his fingers, and run all around like electricity shocking him.

Q. Could that be found by an expert touching it. In other words, can he draw them back himself?

A. No, hardly. It is something over which he has no control. It hurts him to straighten them.

Q. What causes that condition, doctor?

A. As I said before, it is due to the nerves being tangled, in the process of healing, in the scar tissue. The scar tissue in contracting has caused the neuritis.

Q. Could that be remedied in any way?

A. Yes.

Q. How?

122 A. By amputating his fingers higher up, and clipping the nerves off short enough to get them away from the healing process; they would not be involved in it.

Q. Describe what operation would be necessary; what would be necessary to do?

A. Well, he would have to have a general anesthetic and have his three fingers amputated.

Q. Not the whole of the three fingers?

A. No, just from there (indicating on plaintiff's hand) up, away from the—far enough away from the stumps to get a good flap.

Q. Would that operation be painful?

A. It would be without an anesthetic.

Q. But you would give an anesthetic, would you?

A. Yes sir, you would have to have a general anesthetic to have three fingers amputated.

Q. And after the recovery from the anesthetic, would there be any pain suffered?

A. Yes, suffer some pain.

Q. How long would it take those fingers to heal?

A. It would be six weeks or two months. They would heal in two weeks, but still be tender, of course.

Q. About how long would it be before he would be able to work?

A. If he had no complications or anything of the kind, he ought to be able to work in two or three months.

Q. Would the loss, then, of the ends of those three fingers as they would be in after the second amputation, interfere with his work?

123 A. Oh yes, it would decrease the utility of his hand quite a bit.

Judge Sutter: That is all.

The Court: Cross examine.

Cross-examination.

By Mr. d'Autremont:

124 Q. You made a careful examination of this man, doctor?

A. Yes sir.

Q. Did he have a part of his nails there?

A. Nail on the end of each one of his fingers.

Q. You are sure of that?

A. Yes sir.

Q. Nail on each one of his fingers?

A. Yes sir.

Q. You are just as sure of that as you are anything else?

A. Yes; there is not all of any nail. Some of the nail left on each one.

Q. If the other doctor says that was a part of the scar tissue, you would say that was a part of the scar tissue?

A. Yes, they might call it anything they wanted to.

Q. If a doctor told you it was a part of the scar tissue, would you question his good judgment?

A. Yes sir, I would have to have a microscopic section of it to prove to me that it was scar tissue.

Q. You would not think very much of his judgment?

A. I would not on that point.

- Q. On that part of it?  
A. On that part of it.
- 125 Q. If he did, what would you think of it?  
A. They might not be honest in calling it scar tissue.
- Q. If a doctor examined those fingers from June until August and called it scar tissue, would you think that he had overlooked something?  
A. I think that he didn't see that he had some nail on his fingers.
- Q. So all doctors can never agree?  
A. Oh, they agree on a great many things.
- Q. On a great many things, and they constantly disagree on some others the same as any other professions?  
A. I don't know about that. I think they have a very harmonious professional career.
- Q. You might disagree on what might be a scar tissue and a nail or would any two equally good physicians know a nail when they would see it?  
A. Oh yes, they would know a nail.
- Q. Very confident?  
A. Yes sir.
- Q. Now, can you see those nerves?  
A. No, not now.
- Q. Could you at any time?  
126 A. You could by opening them up.
- Q. They are amputated?  
A. Yes sir.
- Q. They are now embedded in the scar tissue?  
A. Yes sir.
- Q. No nails in that part?  
A. No, the nail does not go down. Simply some of the walls of the nail bed was left, and afterwards began to grow.
- Q. This anesthetic, would you use an anesthetic?  
A. Ether or chloroform, depending upon the man's heart and kidneys.
- Q. Is there any danger from that?  
A. Yes sir.
- Q. Did you ever have anybody die on you?  
A. No, I never administer an anesthetic very much.
- Q. During the course of an operation, have you known of a normal healthy man dying under the influence of the anesthetic?  
A. No sir, I have never been so unfortunate as to mix up in an operation where the patient died under the anesthetic.
- Q. So it is considered nominal?  
A. It is considered as a hazard to be taken into consideration on any operation, and not to be administered unless the warrant  
127 of—unless the necessity of the operation would warrant that hazard.
- Q. And if any other doctor said to you the danger was not very much, would you dispute him?  
A. Yes sir.
- Q. Now, about the pain, the pain running up this man's left arm,

wouldn't it affect his right arm—up his right arm, would it affect his left arm in any way?

A. After while, it would cause general neuritis.

Q. In his head?

A. Yes, it would affect his sensitive nerves all over.

A. All over his body?

A. Yes sir.

Q. Would it eventually paralyze?

A. No, it is not the motor nerves that are involved.

Q. If he would stub his toe, would that hurt him?

A. Yes, of course it would hurt him if he stubbed it hard enough.

Q. Would that hurt his fingers?

A. No, it would have a nervous influence. It is a little more sensitive.

The Court: You mean, substantially, that the persistent radiation of the nerves, such as you speak of would create a sympathetic  
128 influence on the sensory nerves?

The Witness: Yes sir.

Q. A general debility?

A. No, general hyper-sensitiveness.

Q. Something like smoking too much or some such thing?

A. Yes.

Q. How long after this man came out of the anesthetic, how long did you say the pain would last?

A. Why, it depends on the result of the operation. If it was properly performed, the flaps were not too tight, and the nerves were clipped off short enough to be away, the pain would not amount to a great deal.

Q. Would not amount to a great deal?

A. No sir; it would hurt some, cutting those nerves, especially in a man who has neuritis.

Q. How many days?

A. I could not say.

Q. Few days?

A. Few days.

Q. Heal up, you said, in practically two weeks?

A. It would heal by first intention. It would be practically healed in ten days or two weeks.

Q. You don't think it would take four weeks?

A. For the actual process of healing, no.

129 Q. And when could he go to work?

A. Well, that is something that is difficult to say.

Q. Well, about?

A. It depends on how much amputating of the fingers would be necessary as a certain proposition. If he had enough flap to give him some stumps that were covered, skin over the bone to keep them from being sensitive, after the newness wore off the skin that was over the ends of his fingers, he ought to be able to go to work in a couple of months.

Q. If the operation was properly done, would he ever have to suffer any pain at all?



A. No sir.

Q. And would become as hard as any other part of the hands?

A. They would always be sensitive. He would not have the protection of the normal end of the nail.

Q. The other part?

A. The other part of his fingers, except the very ends.

Q. Did you ever have a man complain to you, after the ends of his fingers were amputated of tenderness?

A. Yes, the ends of them are always more or less tender and they suffer from cold.

Q. From cold?

A. Yes sir.

Q. The same as we do when our fingers are cold?

A. Yes, only they get cold at a great deal higher temperature than the normal fingers.

130 Q. Now, about what would the cost of this operation be?

A. It would depend. I have done it for nothing many a time.

Q. For a man in moderate circumstances in life, a competent physician, what would the cost of the operation be?

A. If you will allow me, I will consult the scale of fees.

Q. Have you a scale of fees?

A. They are fees that are generally used among the ordinary run of every day physicians.

Q. I mean for a laboring man?

A. Yes sir.

Q. There is a fixed fee?

A. Yes sir.

Q. Who fixes it?

A. Why, the county, state and national medical associations.

Q. Fix the fees for such operations?

A. Yes sir.

The Court: Do you mean they fix it as an absolute fee?

The Witness: No, they recommend it as the proper basis, so if a man comes in and cuts off a finger for fifty cents he is a piker, and if he charges three hundred and fifty dollars, he is a grafter.

131 Q. It is to your interest to keep the fee up?

A. Yes sir.

Q. Not to do any more than possible for fifty cents?

A. No.

Q. Not to do charity work?

A. No, you are not in the country for your health.

Q. But you insist, upon an examination of this hand, that he still has feeling?

A. Yes, he has feeling.

Mr. d'Antremont: That is all.

Redirect examination.

By Judge Sutter:

Q. Point out and show to the jury the nail on his finger.

(The plaintiff comes forward to the witness chair, and the witness indicates.)

A. He has a piece of nail on this finger.

Judge Sutter: That is all.

Witness excused.

132 WILLIAM McDONALD, being called as a witness on behalf of the defendant, and having been duly sworn according to law, testified as follows:

Direct examination.

By Mr. D'Autremont:

Q. Will you state your name please?

A. William McDonald.

Q. Where do you live, Mr. McDonald?

A. Upper Lowell.

Q. Where do you work?

A. Cole Shaft.

Q. Where were you working on November 9th, 1914?

A. I was working at the Cole.

Q. What level were you working on at that time?

A. Nine hundred, working probably two or three sets above the nine hundred, but on the nine hundred.

Q. Do you know Frank Tomich, the plaintiff?

A. Yes, I know the man, but I don't know his name.

133 Q. You have known him for sometime?

A. Yes sir.

Q. How long have you known him?

A. About two or three years I have known him.

Q. Was he working on the same level with you on November 9th, 1914?

A. I don't know when that was?

Q. The day of the accident?

A. Yes, he was on the nine hundred.

Q. Do you recall an accident to Frank Tomich on that date?

A. Yes sir.

Q. I will ask you to state in your own words to the jury all that you know about this accident?

A. Well, all I know about the accident, I was standing, I guess probably ten or twelve feet away, and he come along up with the car. I don't know whether I had taken a drink of water, but I know I had gone to get a drink of water, and he come by this car, and I heard the car, I heard the dirt start rolling out of the car, and

I heard the car make a big noise, and I thought it was some accident, and I heard him holloa, and when I turned around he was close to me, only a step or two and we met right there.

Q. What was he doing when you saw him?

A. He was walking right towards me, shaking his hand that way (indicating) and holloing, whichever hand it was, shaking his hand and holloing.

Q. About how long was it between the time you heard the car hit the chute and the time you heard him holloa?

134 A. It would not be a second. It seemed to me it was all at once, as the car dumped he holloed. I heard this dirt rolling, and it would not be but a second or two.

Q. And what did you do?

A. I started when I heard him, I turned around and probably made two steps and we met right there.

Q. And about how far was he standing from the place where the car was?

A. I would judge not over ten or twelve feet.

Q. Then, what did you do?

A. Well, I didn't do anything. About half a minute or so the shifter come right up, and he taken right hold of him. I don't know if I had taken hold of his arm or not. It was so quick. The shifter was right there, and he taken hold of the hand.

Q. What shifter was it?

A. Murphy, Thomas Murphy.

Q. And then what did you do?

A. Well, he walked right out of the drift holding to his hand, and I walked along by him. I took Frank's coat and bucket, and walked along by him out to the station. There they tied up his hand, and I went back to work.

Q. Did you leave him at any time between the time of this accident until you got to the station with him?

A. No, I was walking right behind him right out.

Q. How long was it before Murphy got to him, between the time that the car hit and the time that Murphy came up to him?

135 A. Well, I don't think it would be over a minute. He had about one hundred and fifty feet to walk over, I suppose. I think he run. I don't know whether he walked or not. He was there it didn't seem to me like a minute. He was right there so close, I could not say just how long it was.

Q. Now, will you describe to the jury by standing up, the position that you were in at the time that you heard the car hit, and what you did afterwards?

A. Yes.

Q. Say the chute was in here (indicating) where were you standing in relation to the chute?

A. Standing about as far away as that place (indicating).

Q. About this far?

A. Yes, my bucket was standing here (indicating).

Q. You had your back to the chute?

A. Yes sir.

Q. Show the jury what you did?

A. I—when he holloed, I turned around like that (indicating) and met right here (indicating). Probably half the way. I made only a step or two until we met, that is all.

Q. Now, you say the time you seen him between the time the car hit, and the time you touched him was what?

A. I might have laid my hand on his shoulder. Murphy was there so quick, I didn't know just what to do, and he was right there and I taken hold of his wrist.

Q. You didn't turn and leave him?

136 A. No sir.

Q. Now, describe this place on the nine hundred level. I will ask you a few questions. How far away from the chute where Tomich was loading to the chute where he was dumping?

A. I don't know exactly.

Q. Approximately?

A. I don't think it would be over fifty, probably fifty-five feet, but I don't know exactly.

Q. Was it a perfectly straight track?

A. Yes, it was a straight track?

Q. There were no turns?

A. Of course, the track might not have been exactly straight, but there were no turns in the drift.

Q. Straight track?

A. Yes sir.

Q. Was there a crosscut running at right angles?

A. There was a cross cut come across in front of the chute.

Q. Did that also have a track in it?

A. Yes, had a track in it. It didn't have all the way out to the main drift, but there was a track right there. I don't think there was a track to the main drift. I am not sure. I was away from it a ways at that time.

Q. Have you ever dumped cars at that place?

A. Yes, I dumped some cars there.

Q. Loaded from the same chute and dumped in the same chute?

A. They had a chute on the right, and had one on the left, and I loaded some on the left. I don't remember whether I loaded any out of the right or not.

137 Q. Now, about how much grade was there in that track from the chute down to the chute where he dumped?

A. Well, I don't know just what the grade was. There wasn't any grade at all about half way, and then there was a grade that the car would run down. You would have to hold back on it a little.

Q. About how fast would the car run; how much strength would you have to push upon the car, if you were pushing it ordinarily?

A. How much strength would I put on it to hold it back?

Q. Yes.

A. I don't know.

Q. Would you have to strain?

A. No, I would have one hand on the car and the other up against the post, so that it would ease up against the bumping board. I

never like to hit them bumping boards. I don't like to hit them bumping boards. I suppose that when anybody is used to it, they run anyway.

Q. Did you ever see a car on this level at any time with a lever throwing from left to right?

A. I never did.

Q. Did you ever see any car that way?

A. I never did, no sir.

Q. Now, this chute that you were dumping ore down, there was a dumping board on the bottom?

A. Yes, a dumping board.

Q. And protection bars?

A. Nailed up to keep the car, I suppose, to keep the car from going over. That is what I call them, the bumping board, it is about four feet.

138 Q. About how wide was that?

A. Which, the bar above or the one below?

Q. The board below—the board above?

A. They are two by ten or two by twelve; they generally use them.

Q. About — high up was it?

A. About four feet, I guess. Probably four and a half. I don't know for sure. I could not say. I never measured the bar and never nailed it on. I would not know how high it was.

Q. About ten feet from the shaft, from the chute, what is the condition of the track there?

A. The track was al- right outside of this little grade that started, probably the car was right about fifteen feet from the chute, as well as I can remember, but from where you started the car, I had to push. There was no grade where you started the car that I could tell.

Q. Now, did you ever have any difficulty about making Mr. Tomich understand?

A. In talking?

Q. In talking?

A. No, not much.

Q. You never talked to him very much?

A. Well I have talked to him quite a few times and he could always understand.

Q. Now, did you see Tomich when he returned to work?

A. I seen him the morning he returned on the surface.

Q. On the surface?

A. I don't remember whether I seen him under ground or not.

139 Q. Did you talk with him?

A. Yes sir.

Q. When, after that, did you see Mr. Tomich?

A. I don't remember if I seen him around Lowell, but he came up to the house one day.

Q. Did he come up to your house?

A. Yes, he came up to my house.

Q. Did he have an interpreter with him?

A. No sir.

Q. What did he say to you when he came to your house?

A. He wanted me to go to Bisbee.

Judge Sutter: Now, we object to what he said to him when he came to his house.

The Court: What the plaintiff said?

Judge Sutter: Yes.

The Court: Objection overruled.

Q. What did Mr. Tomich say to you?

A. He said there was a fellow at Bisbee, he wanted me to see that fellow.

Q. Did he tell you the name?

A. Louie something.

Q. Called him Louie?

A. I don't know whether he said Louie or said his last name, I won't be sure which.

Q. Was it Louie Roscoe?

A. I know the man; he was the man here yesterday.

Q. You saw him yesterday?

A. I seen him around here yesterday.

Q. He is around here now?

A. Yes sir.

140 Judge Sutter: We will admit that it was Louie Roscoe.

The Court: Very well, it is admitted.

Cross-examination.

By Judge Sutter:

Q. He told you that Fred Sutter, the attorney at Bisbee wanted to see you to see what you knew about the case?

A. Yes sir, Louie told me he wanted me to meet Mr. Sutter, and I was up at Bisbee, and he said he wanted me to go and see this fellow, and I went over to see Louie and he told me.

Q. To come up to see me. I am Sutter.

A. If you are Sutter. I was pretty tired, and didn't go.

Q. Louie didn't come back to see you?

A. Louie was down at the house afterwards. I wasn't there.

Q. If you were not there, how do you know he was?

A. My wife told me.

Q. Anything that was told you would be hearsay testimony. It is only what you know yourself. You never came to see me, and after that you never had any further conversation with Louie Hoscoe, did you?

A. No.

Judge Sutter: That is all.

The Court: Is that all, Mr. d'Autremont?

Redirect examination.

By Mr. d'Autremont:

Q. Was there a turn sheet in front of the chute?

141 A. Yes, there was a turn sheet there.

Mr. d'Autremont: That is all.

Judge Sutter: That is all.

Examination.

By Members of the Jury:

Q. Are you employed by this company now?

A. Yes sir.

Q. At the present time?

A. Yes sir.

Q. Does your testimony in this case have any bearing on your position?

A. No sir.

Q. You would not be afraid to testify in this case either for the plaintiff or the defendant?

A. It would not make any difference to me.

The Court: Has anybody ever asked you to testify?

The Witness: No sir.

Judge Sutter: I think Mr. McDonald tried to testify to the truth.

Mr. d'Autremont: What did I tell you to testify to when I talked with you about it this morning?

The Witness: To testify the truth and nothing else.

Judge Sutter: I don't believe Mr. d'Autremont would tell him anything else.

The Court: That is all.

THOMAS A. MURPHY, being called as a witness on behalf of the Plaintiff, and having been duly sworn according to law, testified as follows:

142 Direct examination.

By Mr. d'Autremont:

Q. What is your name, Mr. Murphy?

A. Thomas A.

Q. Where do you live?

A. Bisbee.

Q. Where do you work?

A. Cole Shaft.

Q. What is your position?

A. Shift boss.

Q. What were you doing on November 9th, 1914, what position did you hold then?

A. Shift boss.

Q. Was the nine hundred level part of your run?

A. Yes sir.

Q. Do you remember the plaintiff, Frank Tomich?

A. Yes sir.

Q. Was he one of your men?

A. Yes sir.

Q. Do you recall the accident to him on November 9th, 1914?

A. Yes sir.

Q. Will you state just in your own words all you know about it?

A. Well, Mr. Thomas was running a car there to what we call the Sixty-two feet. I should judge it was something like thirty feet from the Fifty-four Raise, and we went down to the ten hundred and came up to the nine hundred, and while he loaded this car, he run it out there——

143 Judge Sutter: Now, wait, Mr. Murphy, pardon me for interrupting. Were you there when he loaded this car?

Q. Tell, Mr. Murphy, what you saw?

Judge Sutter: Actually yourself.

The Witness: Well, he certainly loaded the car.

The Court: State what you saw.

Judge Sutter: Not what you presume.

Q. Just what you saw?

A. Well, I didn't see him dump the car but as I came from the Forty-eight Stope, and just as I got down there, I heard him holloa and I rushed out there, and when I got out there he was holding his hand, shaking it like this (indicating) and holloing like that, and I says "Frank don't look at it," I says "don't look at it," he was looking at his hand, and I took him out to the station and I bandaged it up. The car at this time was dumped up at the chute. This guard rail was on top there, and I didn't notice just exactly how the car was against this guard rail, but I was under the impression——

Judge Sutter: Now, don't state your impressions. State the facts as you found them, Mr. Murphy.

The Witness: I am stating as near as I possibly can.

The Court: Just state exactly what you saw there, Mr. Murphy.

Judge Sutter: No impressions.

Q. State your best recollection of what you saw.

A. That is my best recollection, and I took him by the wrist and held his wrist here (indicating) and took him out to the  
144 station and administered first aid to him, and sent him to the hospital; the doctor.

Q. How long did it take you between the time you heard him holloa until the time you got there?

A. Not more than forty seconds.

Q. Whom did you find there with him when you got there?



A. Mr. McDonald, a timberman. He was timbering on the stope and had been down there.

Q. Tomich and he were together?

A. Yes sir.

Q. You didn't stop to examine his feet?

A. No sir.

Q. Now, can you state about this place of the accident, was the track—what shape was the track in?

A. Well, it was in good shape.

Judge Sutter: "Good shape," what is that?

Q. What do you mean by "good shape"?

A. Well, it was virtually a new track. Now, I don't think that track had been in more than ten days or probably two weeks, not more than that, and this raise is supposed to come right up alongside of the crosscut, but we missed it about two feet, consequently got a pretty long set in there; instead of having a five foot set we had about a seven foot tap in there. This Fifty-four Raise, that comes up alongside of the One hundred and sixteen cross cut was supposed to come up on the edge of the cross cut, but we missed it about two feet, so instead of having a regular set in there, we had a seven foot tap.

Q. Is that all you wanted to say?

145 A. Well, this track runs right over here, and the car dumps right at this dump, and has about a two foot slide into the chute instead of going right over to the chute to dump, there is a little bit of a slide in there where this muck is rolled down into the mouth.

Q. The track went to the mouth of the chute?

A. Yes sir.

A Juror: Right at the end of the track?

The Witness: Right at the end of the track. This track run right over to the chute, and the guard rail over there, and the bar on the bottom, so that the car, the wheels of the car strike that bar on the bottom, and when it does that the guard rail on top would catch the car there and turn it over, or keep it from turning clear over?

Q. What is the height of the guard rail, about?

A. Well, about four feet, I should judge.

Q. Did I ever ask you about this guard rail at all?

A. No sir.

Q. You don't recall me ever asking you a question about that guard rail?

A. No sir.

Q. What is that guard rail made of?

A. Well, if I remember, it is two inch lagging.

Q. Put across?

A. Nailed right across.

Q. In your experience—did the company at that time have any cars which dumped with the lever throwing from left to right?

A. With the lever throwing from left to right?

Q. Yes, that you dumped with your left hand?

146 A. No sir.

Q. Did you ever see a car that dumped that way?

A. No sir.

Q. Now, is there any grade in this track between the two chutes, where you loaded until you come to the chute where you dumped it?

A. There was a little grade.

Q. About how much was that?

A. Well, that probably would be maybe seven inches in a hundred feet.

Q. Was there ever any danger of a car running away down that grade?

Mr. d'Autremont: You admit he is a good miner?

Judge Sutter: Yes, good miner.

Q. Did you give instructions to the carmen?

A. Yes sir.

Q. What are your instructions to the carmen as to dumping their car?

A. Well, that depends on the conditions. Of course, some places, we have a side dump.

Q. When you say "side dump", you mean dumping sideways into the chute?

A. Dumping sideways into the chute.

Q. Yes?

A. The handles on the car, I have constructed many of them, when they strike this rail on the bottom, and you throw this lever off and the impact of the car will go over there; will save them from doing any lifting, and the car will naturally dump itself.

The Court You mean you throw this lever a little before you strike.

147 The Witness: Yes, just before they strike, and the car will naturally dump itself.

Q. You have the discharging of the men, have you not?

A. Yes sir.

Q. If a man had worked three years for the company, and he would accidentally dump this car down the chute, would you fire him?

A. No, I think not. It would depend a good deal on the circumstances. If he worked for me that long, I would consider it must be an accident.

Q. You have talked with Tomich?

A. Yes sir.

Q. Did you ever have any difficulty in making him understand?

A. No sir.

Q. Did you see Tomich after he returned to work?

A. Yes sir.

Q. How long did he work?

A. That, I have been trying to think. I can't recall now just how long he did work.

Q. He has not been back since?

A. Since he came back to work after he got his hand hurt?

Q. Yes?

A. I remember the day he went out, he come and told me he was sick, and I told him "all right", and I says "whenever you get ready, come back," but I have never seen him since. I never seen him until I seen him out here today.

Q. Would his position be open to him if he went back?

148 Judge Sutter: We object to that as immaterial.

The Court: Objection sustained.

Judge Sutter: No, we withdraw the objection.

Q. Would Mr. Tomich's position be open to him if he went back?

Judge Sutter: After this law suit?

Q. After this law suit?

A. It is out of my line.

Q. If you had the hiring of him?

Judge Sutter: We object.

The Court: Objection sustained.

The Witness: I don't do any hiring.

Q. While you were walking out to the station with Mr. Tomich, did he say anything to you?

A. I believe I asked him how it happened, "how did you come to catch your hand that way", and he said he had it on top of the car.

Q. Is it a part of your duties to inquire of all men how the accidents happen on your run?

A. Yes sir.

Q. You always inquire?

A. Yes sir.

Mr. d'Autremont: That is all.

Judge Sutter: That is all.

Examination.

By Members of the Jury:

Q. You said awhile ago when the attorneys asked you about this party, you said you were trying to think how long he had worked there. What was your idea of thinking about it? Was this question put to you before that?

A. No sir, not before.

149 Q. Well, what was the idea of your trying to think of it?

A. Well, the idea was simply this—

Q. That you thought it might be asked you?

A. About three weeks ago I was notified I might have to come to Tombstone on the 10th or 11th of February to testify in this case, and I naturally tried to recall all the circumstances connected with it that I could think of so that I would be able to explain it intelligently as I possibly could.

Q. If that guard bar had been four feet would it have been pos-

sible for this man to have caught his hand between the top of the guard and that board?

A. That depends entirely upon where the car dumps.

Q. It dumped when it struck the bumping board?

A. No sir.

Q. It would not have been possible?

A. No sir, but if it run over this guard rail or dumping board, then it might.

Q. Then it would have knocked the dumping board out?

A. Either that or jerked it.

Q. Or jerked it?

A. Yes sir.

#### Examination.

By the Court:

Q. Supposing the lever had not been thrown, and the car had struck the dumping board without the lever having been thrown, what would then have been the effect?

150 A. The result would virtually be the same.

Q. Could a man who had his fingers on the back of the car, if the car dumped without the lever being thrown so that the whole truck went up in the air, could he then catch his fingers against the guard board?

A. Well, you see, it depends on where the front end of the car is when the car dumps. Now, if the front end of the car has gone sufficiently far so that when the hind end of the car comes up, naturally it would be up under that guard rail.

Q. How wide was this guard rail? How wide did you say it was?

A. It amounts to a two by eight, sometimes two by ten, but usually it is two by six or two by eight.

Q. And set up flatways?

A. Set up flatways, nailed on those two posts. Those two posts are five feet apart, ten by ten timbers, four feet in the clear, and it is nailed on those two posts.

Q. So that the larger surface, the six or eight inch surface would be facing the drift and the car?

A. Exactly.

#### Examination.

By Members of the Jury:

Q. Do you remember whether the muck was still remaining in the car when you saw it at this time or had it been dumped?

A. After that, I could not say. In fact, I didn't pay much attention to the car when I seen this man and heard him holloa, I took him out to the station and administered first aid.

151 Q. Was there fall enough so that a man would naturally have held on to the car?

A. Yes sir.

Q. There was a raise of seven feet that the car would naturally run itself?

A. No sir.

Q. Seven inches in a hundred feet?

A. No, it won't run.

Q. How much would it have to have before it would run?

A. Well, that would depend on the track and the condition of the track, and the bearing of your cars.

Q. You testified that the track was good?

A. Yes, it was virtually new track.

Q. If it had a seven inch grade, it would run itself?

A. Seven inch grade in a hundred feet?

Q. Yes.

A. No sir.

Q. If it was started?

A. After it was started, yes.

The Court: You mean that the car would not get away by itself if standing still, but if it was started it would continue to run?

The Witness: Well, it might.

Mr. d'Autremont: About how much force would it have to have to go through the bumping board and upend against the chute bar? Could it gather that momentum by coasting down?

A. No, because the run is so short. It is not more than thirty feet, and sixty-two feet across the One hundred and sixteen crosscut.

152 Mr. d'Autremont: It would depend on the grease on the wheels, and all that?

The Witness: Exactly.

A Juror: Could that man have holloed while you were coming up or going down, coming in there to where you was at, and you not heard it?

The Witness: No, I think not. This stope I was in, it was only the first floor above, and I was back in that stope, and just came down, and I just come down as he yelled, and I was not over forty feet.

A Juror: He could not have holloed before that and you not heard him?

The Witness: No.

Cross-examination.

By Judge Sutter:

Q. A carman is told to get a pretty fast move on them, and push these cars fast, aren't they?

A. How?

Q. A carman is told to get a move on them, and push those cars fast?

A. Well, it depends on surface conditions.

Q. They are generally expected to step lively to hold their jobs?

A. Well, a reasonable amount of work.

Q. In other words, they are supposed to push instead of hold back?

A. That depends entirely on the track.

## Examination.

By Mr. d'Autremont.

Q. There is no speeding up of those men. They push their cars out and dump them as fast as they can and come back?

153 A. No, I have told them that we were a little short of oxide for that afternoon, and would like for them to get all they possibly can, but as far as forcing them to do anything or anything like that——

The Court: The motto is "safety first"?

The Witness: Yes sir.

## Examination.

By Judge Sutter:

Q. You have told them you have been a little short of oxide, and did you ever tell them when the oxide bins were full that they could lay off a little?

A. Yes sir, many a time.

Q. And they actually laid off?

A. They would not be in any hurry.

Q. Sit down?

A. The carmen, put them along there cleaning track or something like that.

Q. In other words, all they have to do, is to keep to work whenever they have anything to do?

A. Yes sir.

Q. As they used to say when I was in the mines, all they had to do was push the car in, fill it up and push it out again, that is all they had to do?

A. Yes sir.

Witness excused.

GARFIELD ANGOV, being called as a witness on behalf of the defendant, and having been duly sworn according to law, testified as follows:

## Direct examination.

By Mr. d'Autremont:

Q. State your name please.

A. Garfield Angov.

Q. What is your occupation?

154 A. Miner.

Q. Where are you working now?

A. Cole Shaft.

Q. Were you employed at the Cole Shaft on November 9th, 1914?

A. Yes sir.

Q. Do you recall finding a dumped car on that day at Chute Fifty four?

A. Yes sir.

Q. State to the jury if you have talked with me about this accident?

A. Sir?

Q. State if you have talked with me about this accident?

A. No sir.

Q. Will you state to the jury just the condition you found that car in on the morning of November 9th, 1914?

A. Yes sir, it was in a square set of timbers with the guard rail, you see, and the dump board at the bottom, and the car was dumped right up against the guard rail, and the hind wheels of the truck was off the track, and the front wheels were still on. It was partly broken through the dump board at the bottom, that keeps the wheels from going into the chute. Of course we pulled it back on the track, and that is the way I found the car, in that position.

A Juror: Was it empty or full?

The Witness: It was empty.

A Juror: You say it was empty?

The Witness: Yes sir, as far as I can recall to memory now.

155 Q. Did you take any particular notice of the car at that time?

A. No, I saw it was dumped up, and we hauled it back on again so that the other fellow could go on running it again.

Q. You didn't know there was an accident?

A. Yes, I was maybe sixty feet away looking for a timber, and I saw him pass, going out with this man, leading him to the station.

Q. Was there somebody with you at that time?

A. My working partner. We both went up together and we put this car on.

Q. Who was your partner?

A. Pasco, Bert Pasco was his name.

Mr. d'Autremont: That is all.

Examination.

By Members of the Jury:

Q. Where was the guard rail, against the car, or the car against the guard rail when you saw the car?

A. The car was against the bottom timbers, and it was partly broken through.

Q. I mean the upper guard rail?

A. It was right in place.

Q. The car was against it?

A. The car was against it.

Q. What part of the car was resting against it?

A. Oh, it was down an inch or two inches maybe from the top rail.

Q. The back of the car?

A. The back of the car.



Q. How high was that guard rail from the ground, the top of the guard rail?

156 A. Well now, they usually put them about four feet high.

Q. This one?

A. I could not tell. That was about the regulation height. I never did measure the height from the track up to it.

Q. You don't know then whether the car was moved then from the time this accident happened until the time you seen it?

A. It had not been touched.

The Court: How long after you say you met the shift boss coming down with this man did you go up to where the car was?

The Witness: About a minute and a half or two minutes.

The Court: You walked right up to the car, and met the shift boss coming down, and walked up to the car and straightened it out, is that the idea?

The Witness: Yes sir.

Judge Sutter: The car was upended, and the hind wheels were off the track?

The Witness: Yes sir.

The Court: Any further questions the jury desire to ask.

Judge Sutter: And the hind end of the car was over against the guard rail?

The Witness: Yes sir, that is what kept it from going into the chute.

Judge Sutter: When I say "the hind end," I mean the back and top?

The Witness: Yes sir.

Judge Sutter: That is all.

Witness excused.

157

(Title of Court and Cause.)

*Notice of Filing.*

Fred Sutter, Esq., Attorney for Plaintiff.

SIR: Please take notice that the defendant in the above entitled action filed, on May 24th, A. D. 1916, a transcript of the reporter's notes of the trial of the above entitled action, in the office of the Clerk of the Superior Court of Cochise County, at Tombstone, Cochise County, Arizona.

(Signed)

KNAPP & D'AUTREMONT,

*Attorneys for Defendant.*

Dated: May 26th, 1916.

Received a copy of the within notice of filing this 26th day of May, 1916.

(Signed)

FRED SUTTER,

J. T. KINGSBURY,

*Attorney for Plaintiff.*

Filed: May 27, 1916.



158

(Title of Court and Cause.)

*Stipulation.*

Whereas, the Reporter's Transcript of the evidence of the trial of the above entitled action was filed in this Court on the 24th day of May, 1916, and whereas, the Defendant herein by its Attorneys has certified that same is correct, and:

Whereas, the Honorable Alfred C. Lockwood, Judge of this Court, is at present absent and away, and the date of his return unknown, now, therefore, it is hereby:

Stipulated and agreed by and between the parties hereto that the time for the signature of the Court herein to the said Reporter's Transcript be and the same is hereby extended up to and until the return of the said Honorable Alfred C. Lockwood, to the County Seat of this County.

FRED SUTTER,

*Attorney for Plaintiff.*

KNAPP &amp; D'AUTREMONT,

*Attorneys for Defendant.*

Dated: June 2, 1916.

Filed June 10, 1916.

159

(Title of Court and Cause.)

*Instructions Requested by Defendant.*

You are instructed, if under all the facts in the case and the law as given you in the instructions of the Court, you come to the conclusion that the plaintiff is entitled to recover some amount as damages for the injuries which he claims to have sustained, you must not render what is known as a quotient verdict—that is you must not add together the sums which you severally may believe the plaintiff is entitled to and divide by twelve, or any other number, for the reason that this method of arriving at the amount to be allowed as damages would be unlawful and the court would be compelled to set aside you- verdict.

Given as modified.

ALFRED C. LOCKWOOD, *Judge.*

160

(Title of Court and Cause.)

*Instructions Requested by Defendant.*

## I.

You are instructed that if you find that the injury to the plaintiff was caused by his own negligence, then you must find a verdict for the defendant.

## II.

You are instructed that you must take into consideration the negligence of the plaintiff, if any, in this case, and if you find that the plaintiff was negligent in the handling or dumping of the ore car at the time and place of the injury in this case, that is to say if you find that in the handling or dumping of the ore car, you find that the plaintiff failed to observe the ordinary care and prudence that an ordinary man familiar with the handling or dumping of such cars would have observed under like circumstances, and that such failure on the part of plaintiff to observe such ordinary care, contributed to the injury received by the plaintiff, then you are instructed that in proportion, as you find the negligence of the plaintiff has contributed to his injury, you will reduce the amount of damages to which the plaintiff would otherwise be entitled. That is to say, if you should find that the injury to the plaintiff was caused half by a condition or conditions of the employment of the plaintiff, and half by the negligent conduct of the plaintiff, then you should reduce one half, the amount of damages you find the plaintiff has suffered from the injury.

Given.

ALFRED C. LOCKWOOD, *Judge.*

162

(Title of Court and Cause.)

*Instructions Requested by Defendant.*

You are instructed that unless you believe from the evidence that the injury for which the plaintiff is seeking to recover damages in this case, was due to a condition or conditions of the employment of the plaintiff by the defendant, then you must find for the defendant.

Given.

ALFRED C. LOCKWOOD, *Judge.*

163

(Title of Court and Cause.)

*Instructions Requested by Defendant.*

You are instructed, that unless you find from the evidence that negligence upon the part of the defendant in this case was the cause of the injury sustained by the plaintiff, then you must find for the defendant, for the reason that there can be no liability without fault, in a case such as this.

Refused.

ALFRED C. LOCKWOOD, *Judge.*

164

(Title of Court and Cause.)

*Instructions Given by the Court.*

The Court: Gentlemen of the jury, this is an action wherein Frank Tomich, sometimes known as Frank Thomas has sued the Superior and Pittsburg Copper Company, a corporation, for damages sustained by him, personal injuries, alleged by him to have been sustained while he was working for the defendant, corporation, resulting from one of the conditions or hazards arising out of the employment, the action being brought under what is known as the Employers' Liability Law of this State, which I will read to you. Chapter VI of Title 14 of the Revised Statutes of Arizona.

*"Liability of Employers for Injuries to Workmen in Dangerous Occupations.*

3153. This chapter is and shall be declared to be an employers' liability law as prescribed in Section 7 of Article XVIII of the State Constitution.

3154. That to protect the safety of employees in all hazardous occupations in mining, smelting, manufacturing, railroad or street railway transportation, or any other industry, as provided in said section 7 of article XVIII of the State Constitution, any employer, whether individual, association or corporation, shall be liable  
165 for the death or injury, caused by any accident due to a condition or conditions of such occupation of any employee in the service of such employer in such hazardous occupation, in all cases in which such death or injury of such employee shall not have been caused by the negligence of the employee killed or injured.

3155. The labor and services of workmen at manual and mechanical labor, in the employment of any person, firm, association, company or corporation, in the occupations enumerated in the next section hereof, are hereby declared and determined to be service in a hazardous occupation within the meaning of the terms of the preceding section.

By reason of the nature and conditions of, and the means used and provided for doing the work in, said occupations, such service is especially dangerous and hazardous to the workmen therein, because of risks and hazards which are inherent in such occupations and which are unavoidable by the workmen therein.

3156. The occupations hereby declared and determined to be hazardous within the meaning of this chapter are as follows:

(1) The operation of steam railroads, electrical railroads street  
166 railroads, by locomotives, engines, trains, motors or cars of any kind propelled by steam, electricity, cable or other mechanical power, including the construction, use or repair of machinery, plants, tracks, switches, bridges, roadbeds, upon, over and by which such railway business is operated.

(2) All work when making, using or necessitating dangerous proximity to gunpowder, blasting powder, dynamite, compressed air, or any other explosive.

(3) The erection or demolition of any bridge, building or structure in which there is, or in which the plans and specifications require iron or steel framework.

(4) The operation of all elevators, elevating machines or derricks or hoisting apparatus within or on the outside of any bridge, building or other structure for conveying materials in connection with the erection or demolition of such bridge, building or structure.

(5) All work on ladders or scaffolds of any kind elevated twenty feet or more above the ground of floor beneath in the erection, construction, repair, painting or alteration of any building, bridge, structure or other work in which the same are used.

167 (6) All work of construction, operation, alteration or repair where wires, cables, switchboards, or other apparatus or machinery are in use charged with electrical current.

(7) All work in the construction, alteration, or repair of pole lines for telegraph, telephone or other purposes.

(8) All work in or about quarries, open pits, open cuts, mines, ore reduction works and smelters.

(9) All work in the construction and repair of tunnels, subways and viaducts.

(10) All work in mills, shops, works, yards, plants and factories where steam, electricity or any other mechanical power is used to operate machinery and appliances in and about such premises.

3157. Every employer, whether individual, firm, association, company or corporation, employing workmen in such occupation, of itself or through an agent, shall by rules, regulations or instructions, inform all employees in such occupations as to the duties and restrictions of their employment, to the end of protecting the safety of employees in such employment.

3158. When in the course of work in any of the employments or occupations enumerated in the preceding section, personal  
168 injury or death by any accident arising out of and in the course of such labor, service and employment, and due to a condition or conditions of such occupation or employment, is caused to or suffered by any workman engaged therein, in all cases in which such injury or death of such employee shall not have been caused by the negligence of the employee killed or injured, then the employer of such employee shall be liable in damages to the employee injured, or, in case death ensues, to the personal representative of the deceased for the benefit of the surviving widow or husband and children of such employee; and, if none, then to such employee's parents; and, if none, then to the next of kin dependent upon such employee; and, if none, then to his personal representative, for the benefit of the estate of the deceased.

3159. In all actions hereafter brought against any such employer under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to any employee, or where such injuries have resulted in his death, the question whether the employee

may have been guilty of contributory negligence, or has assumed the risk, shall be a question of fact, and shall at all times, regardless of the state of the evidence relating thereto, be left to the  
169 jury, as provided in section 5 of article XVIII of the state constitution; provided, however, that in all actions brought against any employer, under or by virtue of any of the provisions of this chapter to recover damages for personal injury to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee.

3160. That any contract, rule, regulation or device whatsoever, the purpose or intent of which shall be to enable any employer to exempt himself or itself from any liability created by this chapter, shall to that extent be void; provided, that in any action brought against such employer under or by virtue of any of the provisions of this chapter, such employer may set off therein any sum it has contributed or paid to any insurance, relief, benefit or indemnity, or that it may have paid to the injured employee or his person-representatives on account of the injury or death for which said action was brought.

170 3161. In all actions for damages brought under the provisions of this chapter, if the plaintiff be successful in obtaining judgment, and if the defendant appeals to a higher court, and if the plaintiff in the lower court be again successful; and the judgment of the lower court is sustained by the higher court or courts; then, and in that event the plaintiff shall have added to the amount of such judgment by such higher court or courts, interest at the rate of twelve per cent per annum on the amount of such judgment from the date of the filing of the suit in the first instance until the full amount of such judgment is paid.

3162. No action shall be maintained under this chapter unless commenced within two years from the day the cause of action accrued.

171 If you find in this case that the plaintiff is entitled to recover damages from the defendant, then in arriving at the amount of damages the plaintiff is entitled to recover you should take into consideration the age and condition in life of the plaintiff, the physical injury inflicted, the bodily pain and mental anguish endured, and in considering such pain and anguish, you are not limited to actual pain and suffering endured by plaintiff before trial, but you may consider such future suffering as must necessarily result from the injury complained of. And in further arriving at the amount of damages plaintiff is entitled to recover, you should consider plaintiff's ability or inability to work or earn a living since receiving the injury, and the diminution of plaintiff's earning power from what it was prior to the injury complained of, if any such there be, taking into consideration his earning power at the time of the accident, his age and condition of life. In other words if you find from the evidence in this case that the plaintiff has been

172 permanently injured and that the defendant is liable in damages to the plaintiff for such injury, then the plaintiff is entitled to recover for permanent loss of earning power, which includes loss he has already sustained, and which he is likely to sustain during the remainder of his life on account of said injury, but also if you find that the plaintiff can fully or partly recover by ordinary care or attention, you must take that fact into consideration.

If you find in this case that the plaintiff is entitled to damages from the defendant, the amount of damages which you may give may be any amount within the pleadings, depending upon the view you take of the evidence in the case, as governed by the instructions given you.

You are instructed if, under all the facts in the case, and the law as given you in the instructions of the court, you come to the conclusion that the plaintiff is entitled to recover some amount as damages for the injuries which he claims to have sustained, you must not render what is known as a quotient verdict—that is, you must not add together the sums which you severally may believe the plaintiff is entitled to and divide by twelve, or any other number, for the reason that this method of arriving at the amount to be allowed as damages would be unlawful, and the court would be compelled to set aside your verdict.

You are instructed that if you find that the injury to the plaintiff was caused by his own negligence, then you must find a verdict for the defendant.

173 You are instructed that you must take into consideration the negligence of the plaintiff, if any, in this case, and if you find that the plaintiff was negligent in the handling or dumping of the ore car at the time and place of injury in this case. That is to say, if you find that in the handling or dumping of the ore car you find that the plaintiff failed to observe the ordinary care and prudence that an ordinary man familiar with the handling or dumping of such cars would have observed under like circumstances, and that such failure on the part of the plaintiff to observe such ordinary care contributed to the injury received by the plaintiff, then you are instructed that in proportion, as you find the negligence of the plaintiff has contributed to his injury, you will reduce the amount of damages to which the plaintiff would otherwise be entitled. That is to say, if you should find that the injury to the plaintiff was caused half by a condition or conditions of the employment of the plaintiff, and half by the negligent conduct of the plaintiff, then you should reduce one-half the amount of damage you find the plaintiff has suffered from the injury.

You are instructed that unless you believe from the evidence that the injury for which the plaintiff is seeking to recover damages in this case was due to a condition or conditions of the employment of the plaintiff by the defendant, then you must find for the defendant.

The law in this case, and indeed in every case, is that a party coming into a court of justice must satisfy the jury by what is called a preponderance of evidence as to the justice of his claim.



174 What we mean by the preponderance of evidence is this. Preponderance refers to something that may be weighed. Of course, we cannot get a pair of scales and by some arbitrary method put on one side, the testimony of the plaintiff, and on the other side the testimony of the defendant, and say which one outweighs the other, or whether it is evenly balanced, but you are to try to do that mentally as far as possible.

The law says that unless the plaintiff satisfied you throughout the entire case of the correctness of his story to such an extent that it outweighs the proof of the defendant, he cannot recover. In other words, if the testimony is evenly balanced, it shows that there is some doubt in your mind; that it is not sufficient; that is, if the testimony of the plaintiff weighs just the same as that of the defendant, you must find for the defendant; that is the law. The plaintiff can only recover where his testimony outweighs that of the defendant.

When the court says that the plaintiff must satisfy you throughout the entire case of the correctness of his story, that does not necessarily mean that he must satisfy you of the correctness of his story in every minute detail, but must satisfy you in all the material allegations of the correctness of his side of the case.

You, as the jury, are the sole judges of the evidence in the case and of the credibility of the witnesses. It is for you alone to determine the weight to be given to the evidence, and its effect and sufficiency to establish any fact in support of which it has been offered.

175 In so determining you may take into consideration the character of the witnesses their appearance and their deportment upon the stand; the extent of their knowledge of the facts in regard to which they testify; the manner in which they or any of them may be affected by the verdict you may render; the reasonableness and consistency of their statements, and from these reasons and any others that may have appeared to you upon the case as it has been presented to you, you may judge and determine as to their credibility and the weight, effect and sufficiency of their testimony.

If you believe that any witness has willfully sworn falsely to any material fact in the case, you are at liberty to disregard the entire testimony of such witness except in so far as it has been corroborated by other creditable testimony, or supported by other evidence in the case.

Under the law of this state, if nine or more of your number agree upon a verdict, you may return the same into open court, but should you return a verdict that was not unanimous those of your number who agree on the same should sign their names thereto.

Should your verdict be unanimous, it is only necessary that it be signed by your foreman and returned into open court.

You will be furnished with blank forms of verdict, and when you have reached a conclusion, after considering all the evidence in the case and the instructions of the court, have that form of verdict which meets with your approval signed in the manner above described, and returned into open court.

176

(Title of Court and Cause.)

*Verdict.*

We, the Jury, duly empanelled and sworn in the above entitled action, upon our oaths do find: for the plaintiff in the sum of \$8,000.00, Eight Thousand Dollars.

F. B. STEELE, *Foreman.*

Filed February 17, 1916.

177

(Title of Court and Cause.)

*Judgment.*

This cause came on regularly for trial on the fifteenth day of February, 1916. Fred Sutter and J. T. Kingsbury appeared as counsel for plaintiff; and Knapp & d'Autremont and H. E. Pickett appeared as counsel for defendant. A jury of twelve persons was regularly empaneled and sworn to try said action. Witnesses on the part of plaintiff and defendant were sworn and examined. After hearing the evidence, the arguments of counsel, and the instructions of the Court, the jury retired to consider their verdict, and subsequently returned into Court, with the verdict signed by the foreman, and, being called, answered to their names; and the foreman delivered to the Court the verdict so signed, which said verdict the Court received, and caused to be read and recorded, and which said verdict was in words and figures as follows, to-wit:

"In the Superior Court, County of Cochise, State of Arizona.

FRANK TOMICH, Sometimes Known as FRANK THOMAS, Plaintiff,

vs.

SUPERIOR & PITTSBURG COPPER COMPANY, Defendant.

*Verdict.*

178 We, the Jury, duly empaneled and sworn in the above entitled action, upon our oaths do find: for the plaintiff in the sum of \$8,000, Eight Thousand Dollars.

F. B. STEELE, *Foreman.*

Wherefore, by virtue of the law, and by reason of the premises aforesaid, it is ordered, adjudged, and decreed, that said plaintiff have and recover from said defendant the sum of Eight Thousand Dollars (\$8,000.00), lawful money of the United States, with legal interest thereon from the date hereof until paid, together with plaintiff's costs and disbursements incurred in this action, amounting to



the sum of One Hundred Six and Twenty-Five-One-Hundredths Dollars (\$106.25).

Done in open Court this 29 day of Feby., 1916.

ALFRED C. LOCKWOOD, *Judge.*

Filed Feb. 29, 1916.

(Title of Court and Cause.)

*Notice for Motion for New Trial.*

To Hon. Fred Sutter and Hon. J. T. Kingsbury, attorneys for the plaintiff above named in the above entitled cause:

You will please take notice that the defendant above named, upon the annexed papers and the proceedings now on file in said cause, will move the Court, at the County Courthouse, Tombstone, Arizona, on the 9th day of March, 1916, at 10 o'clock in the forenoon, or as soon thereafter as counsel can be heard, to vacate and set aside the verdict and judgment in the above entitled cause, and to grant a new trial in said cause.

KNAPP & D'AUTREMONT,

H. E. PICKETT,

*Attorneys for Defendant.*

Service of this Notice of Motion for new Trial, and of the annexed Motion for New Trial, is hereby acknowledged, this the 6th day of March, 1916.

FRED SUTTER,

J. T. KINGSBURY,

*Attorneys for Plaintiff.*

W. J. R.

Filed March 6, 1916.

(Title of Court and Cause.)

*Motion for New Trial.*

No. 1007.

Comes now the defendant in the above entitled cause and moves the Court to vacate and set aside the verdict and judgment in this cause rendered, and grant it a new trial upon the following grounds, to-wit.

1.

Because the Court erred in overruling the demurrer of the defendant to the complaint of plaintiff herein, for the following reasons:

First. Because said complaint of plaintiff showed that plaintiff sought to recover judgment against defendant under and by virtue

of Chapter Six, of Title XIV, Revised Statutes of Arizona, 1913, known as the "Employers' Liability Law" and Section 7 of Article XVIII of the Constitution of the State of Arizona are both unconstitutional and void, in that said provisions are contrary to, and contravene, the Fourteenth Amendment to the Constitution of the United States, in that said provisions deprive the defendant of its property without due process of law and deny to it the equal protection of the laws by subjecting it to unlimited liability for damage for personal injuries suffered by its employes without any fault or negligence on the part of the defendant causing such injuries, or contributing thereto, and that therefore, the complaint of plaintiff failed to state facts sufficient to constitute a cause of action against this defendant.

Second. Because it appeared upon the face of plaintiff's complaint, that plaintiff sought to recover judgment against the defendant under and by virtue of the provisions of Chapter Six, of Title XIV of the Civil Code, Revised Statutes of Arizona 1913, known as the "Employers' Liability Law," and that said "Employers' Liability Law" violates, and is in contravention of, the Constitution of the State of Arizona, and particularly of Sections 5 and 7 of Article XVIII thereof in that said "Employers' Liability Law" attempts to give plaintiff the right to recover damages of defendant in this action, notwithstanding the injuries for which said damages are claimed were contributed to and in part caused by plaintiff's own negligence, and that, therefore, said complaint of plaintiff did not state facts sufficient to constitute a cause of action against the defendant.

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2.

Because the Court erred in denying and overruling the motion made by defendant at the close of the evidence introduced by the plaintiff, and at the close of the plaintiff's case, when the plaintiff had rested his case, to instruct the jury to find its verdict herein for and in favor of the defendant;

3.

Because of errors of law occurring at the trial of this cause, and during the progress of this cause;

4.

Because the verdict is not justified by the evidence, and the judgment is not justified by the evidence;

5.

Because the evidence is insufficient to support the verdict, and the evidence is insufficient to support the judgment;

6.

Because the evidence is insufficient to sustain the findings of fact;

7.

Because the verdict and the judgment are contrary to law;

8.

Because the verdict is contrary to law;

9.

Because the judgment is contrary to law;

10.

Because the Court erred in admitting and rejecting evidence;

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11.

Because the Court erred in admitting evidence over the objection of the defendant;

12.

Because the Court erred in rejecting evidence offered by the defendant;

13.

Because the Court erred in charging the jury and in refusing instructions asked;

14.

Because the Court erred in giving instructions asked and requested by the plaintiff;

15.

Because the damages are excessive, given and appearing to have been given under the influence of passion and prejudice;

16.

Because the damages are excessive, given and appearing to have been given under the influence of prejudice;

17.

Because the damages are excessive, given and appearing to have been given under the influence of passion;

18.

Because of the irregularity and irregularities in the proceedings of the jury, in this, to-wit, particularly, in the jury and the member-  
thereof, during the progress of the trial in this cause, personally ex-  
amining and handling the person of the plaintiff and his  
183 alleged injured part or parts thereof, which tended to and did  
work prejudice to the defendant and its cause, whereby  
it was deprived of a fair trial;

19.

Because of misconduct of the jury, and particularly in this, to-wit,  
that the verdict was arrived at by chance, and lot, and average,  
and is what is known as a "quotient verdict";

Wherefore, defendant prays the Court to vacate and set aside the  
verdict and judgment in this cause rendered, and grant it a new  
trial.

KNAPP & D'AUTREMONT,  
H. E. PICKETT,

*Attorneys for Defendant.*

Filed March 6, 1916.

(Title of Court and Cause.)

*Affidavit in Support of Motion for New Trial.*

STATE OF ARIZONA,  
County of Cochise, ss:

H. H. d'Autremont, being first duly sworn according to law upon  
his oath deposes and says:

That he is one of the attorneys for the defendant in the above en-  
titled cause, and was present at and conducted the trial on behalf of  
the said defendant, at the trial of said cause in the above entitled  
Court, and is better informed of the matters and things herein con-  
tained than the defendant, or any of its servants, agents or employes,  
and makes this affidavit on behalf of said defendant in support of  
its Motion for New Trial, and particularly in support of the  
184 ground or grounds, and matters and things set out and alleged  
in Paragraph No. 18 in said motion contained and hereto-  
fore and herein filed;

That during the progress of said trial, and upon and during the  
examination of the plaintiff Frank Tomich, who in said trial offered  
himself as a witness in his own behalf, the said plaintiff was called  
upon to exhibit himself, and offer his person, and the alleged in-  
jured parts thereof, for inspection and physical examination by and  
at the hands of the jury, and the several members thereof, and was  
so called by his attorneys; that the plaintiff presented himself to the

jury, who handled his alleged injured members, to-wit, his fingers, and that the plaintiff during this examination, constantly gave expression to exclamations of pain and suffering, and made various signs and indications of great suffering, repeatedly wincing, and drawing away as if in great pain and suffering throughout, endeavoring to demonstrate the fact that he was suffering great and intense pain in his alleged injured fingers, which tended to, and affiant is informed and believes that the same did, greatly impress the jury, and work great prejudice to the defendant;

That further, in the course of said trial, one Dr. Hawley was offered as a witness by the plaintiff, for the purpose of proving the nature of the alleged injury for which the plaintiff sought to recover, and in the course of his examination on behalf of plaintiff, the attorneys for the plaintiff again presented the plaintiff to the jury, and proposed to show and did so show to the jury, using the person of the plaintiff to illustrate and explain the testimony of said

185 witness Hawley, the nature of the alleged injury, and the condition thereof, as found by the said witness Hawley, during a course of treatment and examinations given and made of the plaintiff by said Hawley, prior to the trial, and thereupon, said witness Hawley, exhibited the plaintiff and his alleged injured parts to the jury, and did examine the same and press upon the same, whereupon plaintiff again gave expression to exclamations of pain and suffering, and winced and gave other indications of great suffering all of which tended to and did greatly impress the jury and appeal to the passions of the jury improperly and did so affiant is informed and believes, work great prejudice to the defendant;

That further, in the course of said trial one Dr. Hughart was called as a witness on behalf of plaintiff for the purpose of proving the nature of the alleged injury for which plaintiff sought to recover, and in the course of his said testimony, the attorneys for the plaintiff again offered to exhibit the person of the plaintiff and his alleged injured parts to the jury, to illustrate the testimony of said witness Hughart, and to show the nature of the said alleged injury and thereupon was again allowed to exhibit himself to the jury and the jury and the members thereof, and the said witness Hughart were permitted, over the objection of defendant, the plaintiff was again allowed to exhibit himself to the jury and the jury and the members thereof, and the said witness Hughart were permitted, over the objection of defendant, did proceed to handle the said alleged injured parts of plaintiff, and to make physical examination of the same, during which procedure, with the members of the jury taking

186 part as aforesaid, said witness Hughart rubbed and passed his hands over in contact with the points of alleged injury, at the same time stating to the jury in effect, and substantially as follows, "see how it hurts him" and to the plaintiff, "I am not going to hurt you", and many other similar remarks addressed to the plaintiff or to the members of the jury; that during the said course of action as aforesaid, the plaintiff repeatedly gave expression to many exclamations of great pain and suffering and violently winced and

gave many other indications of great pain and suffering, such as audibly drawing his breath, etc.

That all of the foregoing matters and things were highly improper, and irregular, and tended to and did, so affiant is informed and believes, appeal to the prejudices and passions of the jury and the members thereof, and so inflamed their minds and aroused their passions and appealed to their prejudice, as to prevent them from impartially or fairly considering the evidence adduced at the trial, to the great prejudice of the defendant, whereby defendant was deprived of a fair and impartial trial, which is particularly evidenced and indicated by the highly excessive verdict returned in this case, in which the aforesaid prejudice and passion is an obvious element.

HUBERT H. D'AUTREMONT.

Subscribed and sworn to before me this 25th day of March, A. D. 1916.

[SEAL.]

A. C. KARGER,  
Notary Public.

187 My commission expires Jan. 2, 1918.

Filed March 25, 1916.

Service of copy of within affidavit admitted and hereby acknowledged, this the 25th day of March, 1916.

J. T. KINGSBURY,  
Attorney for Plaintiff.

(Title of Court and Cause.)

*Affidavit in Support of Motion for New Trial.*

STATE OF ARIZONA,  
County of Cochise, ss:

H. E. Pickett, being first duly sworn according to law upon his oath, deposes and says:

That he is one of the attorneys for the defendant in the above entitled cause, and was present at, and assisted at, the trial on behalf of the said defendant, at the trial of said cause in the above entitled Court, and is better informed of the matters and things herein contained than the defendant, or any of its servants, agents or employes, and makes this affidavit on behalf of said defendant, in support of its Motion for New Trial, and particularly in support of the ground or grounds, and matters and things set out and alleged in Paragraph No. 18 in said Motion contained and heretofore and herein filed;

That during the progress of said trial, and upon and during the examination of the plaintiff, Frank Tomich, who in said trial offered himself as a witness in his own behalf, the said plaintiff was  
188 called upon to exhibit himself, and offer his person, and the alleged injured parts thereof, for inspection and physical ex-

amination by and at the hands of the jury, and the several members thereof, and was so called by his attorneys; that the plaintiff presented himself to the jury, who handled his alleged injured members, to-wit: his fingers, and that the plaintiff during this examination, constantly gave expression to exclamations of pain and suffering, and made various signs and indications of great suffering, repeatedly wincing and drawing away as if in great pain and suffering, through endeavoring to demonstrate the fact that he was suffering great and intense pain in his alleged injured fingers, which tended to, and affiant is informed and believes that the same did, greatly impress the jury and work great prejudice to the defendant.

That further, in the course of said trial, one Dr. Hawley, was offered as a witness by the plaintiff, for the purpose of proving the nature of the alleged injury for which the plaintiff sought to recover, and in the course of his examination on behalf of plaintiff, the attorneys for the plaintiff again presented the plaintiff to the jury, and proposed to show and did so show to the jury, using the person of the plaintiff to illustrate and explain the testimony of said witness Hawley, the nature of the alleged injury, and the condition thereof, as found by the said witness Hawley, during a course of treatment and examinations given and made of the plaintiff by said Hawley, prior to the trial, and thereupon, said witness

189 Hawley, exhibited the plaintiff and his alleged injured parts to the jury, and did examine the same and press upon the same, whereupon again the plaintiff gave expression to exclamations of pain and suffering, and winced and gave other indications of great suffering, all of which tended to and did greatly impress the jury and appeal to the passions of the jury improperly and did, so affiant is informed and believes, work great prejudice to the defendant;

That further, in the course of said trial one Dr. Hughart was called as a witness on behalf of the plaintiff for the purpose of proving the nature of the alleged injury for which plaintiff sought to recover, and in the course of his said testimony, the attorneys for the plaintiff again offered to exhibit the person of the plaintiff and his alleged injured parts to the jury, to illustrate the testimony of said witness Hughart, and to show the nature of the said alleged injury and whereupon, over the objection of defendant, the plaintiff was again allowed to exhibit himself to the jury and the jury and the members thereof, and the said witness Hughart were permitted, over the objection of the defendant, did proceed to handle the said alleged injured parts of plaintiff, and to make physical examination of the same, during which procedure, with the members of the jury taking part as aforesaid, said witness Hughart rubbed or passed his hands over in contact with the points of alleged injury, at the same time stating to the jury in effect and substantially as follows "see how it hurts him" and to the plaintiff "I am not going to hurt you," and many other similar remarks addressed to the plaintiff or to the members of the jury; that during the said course of action as aforesaid, the plaintiff repeatedly gave



190 expression to many exclamations of great pain and suffering and violently winced and gave many other indications of great pain and suffering, such as audibly drawing his breath, etc.

That all of the foregoing matters and things were highly improper, and irregular, and tended to and did, so affiant is informed and believes, appeal to the prejudice and passions of the jury and the members thereof, and so inflamed their minds and aroused their passions and appealed to their prejudice, as to prevent them from impartially or fairly considering the evidence adduced at the trial, to the great prejudice of the defendant, whereby defendant was deprived of a fair and impartial trial, which is particularly evidenced and indicated by the highly excessive verdict returned in this case, in which the aforesaid prejudice and passion is an obvious element.

H. E. PICKETT.

Subscribed and sworn to before me this 25th day of March, A. D. 1916.

[SEAL.]

A. C. KARGER,  
*Notary Public.*

My commission expires Jan. 2, 1918.

Filed March 25, 1916.

Service of copy of within affidavit admitted and hereby acknowledged this, the 25th day of March, 1916.

J. T. KINGSBURY,  
*Attorney for Plaintiff.*

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(Title of Court and Cause.)

Present: Hon. Alfred C. Lockwood, Judge, John F. Ross, County Attorney, Harry C. Wheeler, Sheriff, John W. Walker, Reporter, and J. E. James, Clerk.

*Certified Minutes of Trial Court.*

Minute Entry of March 27, 1916. Book 21, Page 534.

This cause coming before the Court at this time for hearing on Law Points, Plaintiff present by counsel Fred Sutter, Esq., and Defendant present by counsel Cleon T. Knapp, Esq. It appearing that the time for entering an appearance by the defendant herein has expired and defendant not having entered an appearance at this time, upon agreement of counsel for plaintiff and by leave of Court, counsel Cleon T. Knapp, Esq., does now in Open Court enter the Appearance of the defendant herein, and thereafter the Motion of the Defendant to Compel Plaintiff to Elect as to which of the two causes of action set forth in the Complaint of Plaintiff,



be relied upon, was argued and submitted to the Court for decision. The Court considered the premises, denied the motion and permitted Counsel for Defendant two weeks in which to file such amended pleadings as he may deem necessary. Counsel for the Defendant excepted to the ruling of the Court on said Motion. On motion of counsel for the Plaintiff it is by the Court ordered that the Second cause of action set forth in the complaint, be dismissed.

Minute Entry of April 17, 1915. Book 21, Page 578.

It is by the Court ordered that May 22, 1915, be and the same is hereby set as the date for the hearing on law points herein.

192 Minute Entry as of May 22, 1915. Book 22, Page 39.

On agreement of counsel hereto, it is by the Court ordered that the hearing on law points herein be and the same is hereby continued for further setting.

Minute Entry as of July 6, 1915. Book 22, Page 82.

It is by the Court ordered that July 17, 1915, be and the same is hereby set as the date for hearing on law points herein.

Minute Entry as of July 17, 1915. Book 22, Page 116.

This cause came on regularly at this time for hearing on law points. Plaintiff present by counsel Fred Sutter, Esq., and Defendant present by counsel Cleon T. Knapp, Esq. Counsel for Defendant submitted motion to Strike portions of Complaint and elect and Demurrers thereto without argument. The Court considered the premises and denied the motion and overruled the demurrers.

It is by the Court ordered that August 23, 1915, be and the same is hereby set as the date for the trial of this cause.

193 Minute Entry as of August 18, 1915. Book 22, Page 191.

On motion of the plaintiff it is by the Court ordered that the trial of this cause be continued for the term.

Minute Entry as of January 15, 1916. Book 22, Page 465.

It is ordered that February 11, 1916, be set as the date for the trial on Plea in Abatement and on Merits of this cause, but by separate juries.

On motion of counsel for Defendant it is ordered that there be struck from the complaint herein that portion of Paragraph VII of the First Cause of Action, and Paragraph VIII of Plaintiff's Second Cause of Action alleging that Plaintiff was at the time of

said injury and is now a married man with three minor children to support.

Minute Entry as of February 5, 1916. Book 22, Page 519.

This cause came on for hearing on law points this date, Messrs. Fred Sutter and W. B. Cleary, Esquires, appearing for the Plaintiff and H. de Autremont, Esq., appearing for the Defendant. On motion of Fred Sutter, Esq., it is ordered that J. T. Kingsbury, Esq., be entered herein as of counsel for the Plaintiff and on motion of H. de Autremont, Esq., it is ordered that H. E. Pickett, Esq., be entered as of counsel for the Defendant. Counsel then argued and submitted the General Demurrer of Plaintiff to Plea in Abatement of Defendant.

194 The Court considered the premises and sustained the General Demurrer and counsel for Defendant advised the Court that he would amend his pleadings.

Minute Entry as of February 15, 1916. Book 22, Page 537.

This cause came on regularly for trial this date, Plaintiff present in person and by his attorneys, Messrs. Sutter and Kingsbury, and the Defendant appeared by its counsel, Messrs. d'Autremont and Pickett.

Counsel for Defendant presented and filed their Fourth Amended Answer and submitted without argument, the Demurrers set up therein. The Court considered and overruled same.

Parties then announced ready for trial and upon order of the Court, the Clerk drew from the box the names of Twenty (20) Jurors, administered to them the oath and counsel examined the Panel on their Voir Dire. The Court admonished the Panel and excused them until 1:30 p. m. this date.

Minute Entry as of February 15, 1916. Book 22, Page 538.

This cause came before the Court pursuant to recess with all parties to the action and the Jury Panel present. Counsel waived a roll call and, having exercised their *preemptory* challenges, upon order of the Court, the Clerk called the first twelve names remaining on the Jury List unchallenged, and the following are the persons so called, and who were duly sworn as the Jury to try this cause.

195

W. C. Crawford,  
Richard Edwards,  
E. Sylvester,  
R. E. Warner,

E. F. Kellum,  
Hal Smith,  
L. H. Maddux,  
T. C. Collins,

Ed Ikler,  
Randolph Reuser,  
F. B. Steele,  
Joe T. Goodman.

The jurors not engaged in the trial of this cause were excused by the Court until February 17, 1916, at 9:00 a. m. Mike Francovich

was sworn as interpreter. The witnesses were called, sworn, admonished and excluded from the Court room and the trial proceeded.

Come now the Plaintiff and called as witnesses Frank Tomich, and Katie Tomich, who testified and the Jury was admonished by the Court and excused until 9:00 a. m., February 16, 1916.

Minute Entry as of February 16, 1916. Book 22, Page 540.

The trial herein resumed this date with all parties present. The Jury returned into Court; counsel waived a roll call and the Plaintiff called as witnesses: Ed. Massey, C. F. Hawley, H. H. Hughart, who were all duly examined and cross examined, and the Plaintiff rested his case in chief.

Counsel for the Defendant presented and filed and submitted without argument a motion to direct a verdict for the Defendant. The Court considered the premises and denied the motion.

The Defendant then called as witnesses: Wm. McDonald, Thomas Murphy, and Garfield Angov, who were all examined and cross examined and the Defendant rested its case in Chief.

196 Counsel advised the Court that there would be no Rebuttal testimony and the evidence was declared closed.

The Jury was admonished by the Court and excused until 1:30 p. m. this date and recess was ordered until said hour.

Court re-convened pursuant to recess at 1:30 p. m. with all present.

Minute Entry as of February 16, 1916. Book 22, Page 541.

This cause came before the Court pursuant to recess with all parties to the action present and the Jury in the box. Counsel waived a roll call. The Court instructed the Jury. Counsel argued and submitted the cause. Bailiffs James McHugh and Miles Merrill were duly sworn and the Jury retired in their charge to deliberate as to their verdict.

### *Verdict.*

Minute Entry as of February 17, 1916. Book 22, Page 542.

The Jury returned into Open Court in charge of their Bailiffs, all present. Counsel waived a roll call and upon inquiry from the Court the Jury answered through their Foreman that they had agreed upon a verdict and the same was presented to the Court and the following is the verdict so rendered and which was recorded by the Clerk; after stating title of Court and cause:

We, the Jury, duly empaneled and sworn in the above entitled action, upon our oaths, do find for the Plaintiff in the sum  
197 of \$8,000.00, Eight Thousand Dollars.

F. B. STEELE, *Foreman.*

The Jury was excused by the Court from further consideration of this cause. J. T. Kingsbury, Esq., of counsel for the Plaintiff herein moved the Court for judgment on the Verdict as rendered. The Court considered the Motion and ordered that upon the presentation of a formal writ-en judgment in this action by the Plaintiff, and its approval and signing by the Court, judgment will be rendered in favor of the Plaintiff in accordance with the verdict rendered herein.

Minute Entry as of February 24, 1916. Book 22, Page 557.

It is by the Court ordered that the hearing on the Motion for a New Trial herein, be continued until March 4, 1916.

Minute Entry as of February 26, 1916. Book 22, Page 559.

This cause came before the Court at this time for hearing on the Motion to Set Aside the Verdict and Judgment herein and for a New Trial.

Plaintiff present by J. T. Kingsbury, Esq., his counsel and Defendant present by counsel Messrs. d'Autremont and H. E. Pickett. Counsel argued and submitted the Motion to the Court for decision. The Court considered the premises and denied the Motions, to which ruling of the Court counsel for the Defendant excepted.

198 Minute Entry as of February 29, 1916. Book 22, Page 569.

In this cause, the Court having fixed the Jury fee at the sum of \$72.00, and a formal, written judgment in this action having been this day presented to and approved by the Court, in accordance with the order heretofore made, it is ordered that judgment be rendered herein in favor of the plaintiff and against the Defendant for the sum of Eight Thousand Dollars, to bear interest from date hereof until paid at the legal rate of interest and for \$106.25 costs.

Minute Entry of March 9, 1916. Book 22, Page 591.

On motion of H. E. Pickett, Esq., counsel for Defendant herein, it is ordered that March 18, 1916, be set as the date of hearing on Motion for a New Trial.

Minute Entry of March 18, 1916. Book 23, Page 12.

It is by the Court ordered that the hearing on law points herein be and the same is continued until March 25, 1916.

Minute Entry as of March 25, 1916. Book 23, Page 35.

This cause came before the Court at this time for decision of the Court on the Motion of the Defendant for a new trial herein. The Court having considered the said Motion, does now overrule same.

ALFRED C. LOCKWOOD, Judge.

199 STATE OF ARIZONA,  
County of Cochise, ss:

I hereby certify the annexed and foregoing to be a full, true and correct copy of the Minutes (and Supersedeas Bond on Appeal) in the cause entitled Frank Tomich, Plaintiff, vs. Superior and Pittsburg Copper Company, a corporation, Reg. No. 1007 on file in the Clerk's office of the Superior Court, State of Arizona in and for the County of Cochise.

Witness my hand and Seal of said Court this 15th day of July, 1916.

[SEAL.]

J. E. JAMES,  
Clerk of the Superior Court,  
By H. P. JOHNSON,  
Deputy Clerk.

(Title of Court and Cause.)

*Notice of Appeal.*

To Frank Tomich, sometimes known as Frank Thomas, the plaintiff in the above entitled cause, and to Messrs. Fred Sutter and J. T. Kingsbury, attorneys for the said plaintiff in the above entitled cause:

Please take notice, that the Defendant in the above entitled cause, the Superior & Pittsburg Copper Company, a Corporation, 200 hereby appeals to the Supreme Court of the State of Arizona, from the verdict and the judgment rendered thereon in the above styled Court in the above entitled cause upon the 29 day of February, 1916, in favor of the above named Plaintiff and against the said above named Defendant, and from the whole thereof:

And you will please take notice, that the said Defendant the Superior & Pittsburg Copper Company, a corporation, hereby appeals to the Supreme Court of the State of Arizona, from that certain order made and entered in the above entitled cause in said Court above styled, on the 25th day of March, 1916, denying and overruling the Motion of the said Defendant to vacate and set aside the 201 verdict and judgment in said cause and to grant it a New Trial.

KNAPP & D'AUTREMONT,  
H. E. PICKETT,  
Attorneys for the Defendant, The Superior &  
Pittsburg Copper Co., a Corporation.

Filed March 29, 1916.

(Title of Court and Cause.)

*Affidavit of Service.*

STATE OF ARIZONA,  
County of Cochise, as:

H. E. Pickett, being first duly sworn according to law upon his oath says, that he is one of the attorneys for the above named Defendant; that on the 29th day of March, 1916, he served upon the plaintiff in the above entitled cause the Notice of Appeal in this cause filed, as required by law, in the following manner, to-wit, by delivering a copy thereof to J. T. Kingsbury, Esq., one of the attorneys for the above named plaintiff.

H. E. PICKETT.

Subscribed and sworn to before me this the 10th day of June, 1916.

[SEAL.]

JAS. P. BOYLE,

*Notary Public, Cochise County, Arizona.*

202 My commission expires September 1, 1919.

Filed: June 13, 1916.

(Title of Court and Cause.)

*Supersedeas Bond on Appeal.*

Know all men by these presents: That we, the Superior and Pittsburg Copper Company, a Corporation, the defendant in the above entitled cause, as Principal, and J. E. Curry of Warren, Arizona, and M. J. Brophy, of Bisbee, Arizona, as Sureties are held and firmly bound unto Frank Tomich, sometimes known as Frank Thomas, the Plaintiff in the above entitled cause, in the sum of Seventeen Thousand and no-100 Dollars (\$17,000.00), lawful money of the United States of America, for the payment thereof, well and truly to be made, we bind ourselves, all and each of our successors, heirs, and legal representatives, jointly and severally, firmly by these presents, signed with our hands and sealed with our seals, this 31st day of March, 1916.

The condition of the above undertaking is such that, whereas, in the Superior Court of the County of Cochise, State of Arizona, on the 29th day of February, 1916, said Court rendered judgment against said above named Defendant and in favor of said above named Plaintiff in and for the sum of Eight Thousand Dollars (\$8,000.00) together with interest thereon at the legal rate thereof per annum from date of said judgment until paid, and for costs of suit taxed at the sum of \$106.25, all in the above entitled cause, and that said judgment in said cause was filed for record on the said 29th day of February, 1916; and that in said cause the said Court on

203

the 25th day of March, 1916, made and entered its order denying the motion of the defendant to vacate and set aside the verdict and judgment in said cause and to grant it a New Trial;

And whereas, the said Defendant, The Superior and Pittsburg Copper Company, a Corporation, is desirous of appealing to the Supreme Court of the State of Arizona from said verdict and judgment, and from said order denying its said Motion to vacate and set aside said verdict and judgment and to grant it a New Trial, and having given its Notice of Appeal therefrom, all and singular, to said Supreme Court, according to the law in such cases made and provided;

Now Therefore, if the said Defendant, the Superior and Pittsburg Copper Company, a corporation, will prosecute its said appeal with effect, and in case the judgment of the said Supreme Court shall be against it, that it will perform its judgment sentence or decree, and pay all such damage and costs as may be awarded against it on appeal, then this obligation to be null and void, otherwise to be and remain in full force, virtue and effect.

THE SUPERIOR AND PITTSBURG COPPER  
COMPANY, A CORPORATION, [SEAL.]

By JOHN C. GREENWAY,  
*Its General Manager.*

J. E. CURRY, [SEAL.]  
M. J. BROPHY. [SEAL.]

204 STATE OF ARIZONA,  
*County of Cochise, ss:*

J. E. Curry and M. J. Brophy, the sureties in the foregoing undertaking, being duly sworn according to law, each for himself and not the one for the other, says, that he is worth the sum of Seventeen Thousand Dollars (\$17,000.00) over and above all his just debts and liabilities, exclusive of property exempt from execution and that he is a resident freeholder within said County of Cochise, State of Arizona.

M. J. BROPHY.  
J. E. CURRY.

Subscribed and sworn to before me, this the 31 day of March, 1916.

[SEAL.]

H. W. WILLIAMS,  
*Notary Public, Cochise County, Arizona.*

My Commission expires Feb. 19, 1920.

Filed: April 4, 1916.

Approved: April 4, 1916.

Service of the within Supersedeas Bond on Appeal is hereby admitted this 3rd day of April, 1916.

FRED SUTTER,  
By W. J. R.,  
*Attorney for the Plaintiff.*



205 In the Supreme Court of the State of Arizona.

No. 1535.

SUPERIOR & PITTSBURG COPPER COMPANY, a Corporation, Appellant,

vs.

FRANK TOMICH, Sometimes Known as FRANK THOMAS, Appellee.

Be It Remembered, that on, towit, the 8th day of January, 1917, the same being one of the regular juridical days of the said Supreme Court, the following Order was had and entered of record in the said cause, which said Order is in the following words and figures as follows, to-wit:

At this day, It Is Ordered, that the above cause be and the same is hereby set for oral argument on Friday, January 19th.

206 And afterwards and upon, towit, the 19th day of January, 1917, the same being one of the regular juridical days of the said Supreme Court, the following Order was had and entered of record in the said cause in words and figures as follows, towit:

This cause coming on for hearing at this time was argued for appellant by Mr. Herbert d'Autremont, and for appellee by Judge Fred Sutter; and ordered submitted.

207 In the Supreme Court of the State of Arizona.

No. 1535.

SUPERIOR AND PITTSBURG COPPER COMPANY, a Corporation, Appellant,

vs.

FRANK TOMICH, Sometimes Known as FRANK THOMAS, Appellee.

Appeal from a Judgment of the Superior Court of Cochise County, Alfred C. Lockwood, Judge. Affirmed.

*Opinion.*

The appellee was employed by the appellant in underground workings of its mines in Cochise County. The appellee's duties required him to load, push on a track, and unload ore cars. The place for the performance of such duties was on the nine hundred foot level of the mine. The track was laid through a drift from the point of loading the cars to a point of unloading the ores into a chute. The appellee was an experienced car man accustomed to such work in other mines. When the car had received its load of about two thousand pounds weight, the appellee was required to start the car moving



on the track, and control its movements until the chute was reached.

208 Timbers were so placed about the chute as to facilitate the unloading or dumping of the load. On November 9th, 1914, and a few hours after appellee had first commenced his labors in the said drift, he started a loaded car from the point of loading along the track toward the chute, and following the car with his right hand holding the top of the rear end of the car as it moved over the track by gravity, appellee stumbled over something on the floor or slipped on the track or on the ground and was thrown to the ground but continued to hold to the rear end of the ore car as it moved toward the chute. So holding to the car, the car struck the obstructions about the chute with such force that the fastenings on the doors of the car released and the car ended over so that three fingers on appellee's right hand were caught between the rear end of the car which he was holding and a cross timber about the chute. The fingers were lacerated, crushed and bruised so that they were amputated about the first joints of each finger. The said surgical operation was done at the appellant's hospital department, and when the wounds healed the nerves were left so exposed as to be sensitive and tender and causing suffering, and a further amputation of the fingers is required to relieve such condition. The

209 appellee commenced this action to recover damages for his said injuries basing his cause of action on the Employers' Liability Law, Chapter VI of Title 14 of the Civil Code of Arizona, 1913, and upon negligence. The cause of action founded upon negligence was expressly waived and abandoned by plaintiff upon the trial. The defendant demurred to the complaint upon the ground that the Employers' Liability Law and the constitutional mandate in obedience to which such statute was enacted are both void because they are contrary to and contravene the Fourteenth Amendment to the Constitution of the United States, in that they deprive the defendant of its property without due process of law, and deny to it the equal protection of the law, by subjecting it to unlimited liability for damages for personal injuries suffered by its employees without any fault or negligence on its part, and, because such statute attempts to

210 give plaintiff the right to recover damages of defendant notwithstanding the injuries for which such damages are claimed were contributed to and in part caused by plaintiff's own negligence, and attempts to deprive the defendant of the right to wholly defeat this action by interposing the defense of contributory negligence. The defendant alleges that the damages, if any, resulted wholly from plaintiff's neglect and carelessness, and his failure to use any care or caution in his own behalf at the time and place of the alleged injury. The further defense is that the plaintiff contributed to the injury by his own negligence, in that at the time of its occurrence the plaintiff was giving no attention or insufficient attention to his duties, and failed to push the car in the proper manner or place his hands on the car in the proper position, and other like failures are alleged.

The court overruled the demurrer and the cause was tried to a

- jury. The jury returned a verdict against the defendant for the sum of \$8,000.00. Judgment followed the verdict
- 211 The defendant appeals from the judgment and from an order refusing a new trial.

Messrs. Knapp and D'Autremont, of Bisbee, and Mr. H. E. Pickett, of Douglas, for Appellant.

Mr. Fred Sutter, of Bisbee, and Mr. J. T. Kingsbury, of Tombstone, for Appellee.

CUNNINGHAM, J.:

The appellant assigns as error the overruling of its demurrers to the complaint for the reason both Chapter VI of Title 14, Revised Statutes of Arizona, 1913, Civil Code, upon which the action is based, and the constitutional mandate, Section 7 of Article XVIII of the State Constitution, in obedience to which said Chapter VI was enacted, violate Section 1 of the Fourteenth Amendment to the Constitution of the United States, in that the Employers' Liability Law, said Chapter VI of Title 14, attempts to deprive the defendant of its property without due process of law by imposing unlimited liability on it as an employer for personal injuries sustained by an employee while in its employ in cases where defendant has been guilty of no fault, want of care, or neglect of duty; and, because the Employers' Liability Law contravenes and is in violation of Sections 5 and

- 212 7 of Article XVIII of the constitution of the State of Arizona, in that said statute attempts to give plaintiff the right to recover judgment for personal injuries notwithstanding the injuries for which said judgment is sought were contributed to and in part caused by plaintiff's negligence, and attempts to deprive defendant of the right to wholly defeat this action by showing that said injuries were contributed to and in part caused by plaintiff's own negligence.

The questions of the constitutional validity of the Employers' Liability Law are raised in a number of different objections. The defendant assigns as error the admission and rejection of evidence and misconduct of the trial judge during the trial of the cause working a prejudice and resulting in an excessive verdict.

The appellant groups the assignments of error under four divisions covering the points of law raised in the cause.

First. The Employers' Liability Law, Chapter VI of Title 14, under which the action is brought is unconstitutional and void;

- 213 Second. That the plaintiff failed to make out a case warranting recovery under the Employers' Liability Law;

Third. Error in admitting and excluding evidence and in giving instructions; and,

Fourth. An excessive verdict.

Under the first division the case of Inspiration Consolidated Copper Company v. Mendez, 19 Ariz., —, not yet reported, on the authority of New York C. R. Co. v. White, U. S. Adv. Ops. 1916, page 247, holds to the opinion that the Employers' Liability Law is valid within the police powers of the State and does not come into con-

flict with the Fourteenth Amendment of the Constitution of the United States; and, that such Liability Law is a valid, subsisting enactment and is a law of the State of Arizona.

Appellant contends that Chapter VI of Title 14 is void for the reason its terms conflict with Sections 5 and 7 of Article XVIII of the State Constitution.

Section 5 is that:

214 "The defense of contributory negligence or of assumption of risk shall, in all cases whatsoever, be a question of fact and shall, at all times, be left to the jury."

This section does not restrict the power of the legislature to modify or abolish the defense of contributory negligence. The restriction contained in the section is clear that no law shall be enacted which attempts to make the defenses of contributory negligence or assumption of risk, when interposed, determinable by the courts as matters of law, but, such defenses are made to depend upon facts when they are properly interposable, and interposed they are required to be established by a preponderance of the evidence to the satisfaction of the jury. Whether the plaintiff's negligence contributed to the wrong, or whether the plaintiff assumed the risk and danger from which the wrong arose, must be determined as a fact from the evidence by the jury.

Section 7 commands the legislature to enact an employers' liability law, by the terms of which any employer shall be liable for the death  
215 or injury of workmen employed in all hazardous occupations named, and any other industry designated by the legislature, whenever such death or injury is caused by any accident due to a condition or conditions of such occupation, except when such death or injury has been caused by the negligence of the employee killed or injured.

The only restriction placed upon the legislative power in carrying out said constitutional mandate found in the section of the Constitution is the exception, viz.: liability is incurred "in all cases in which such death or injury of such employee shall not have been caused by the negligence of the employee killed or injured." In all other cases the legislative power is unlimited by said Section 7.

A careful examination of Chapter VI of Title 14 discloses no violation of such limitation on the power of the legislature. The exception is carefully preserved in Paragraph 3154 of the statute. If the injury resulted from an accident arising out of and in the course of labor, service and employment in a hazardous occupation, and was due to a condition or conditions of such occupation or employment, and was not caused by the negligence of the employee the liability to damages exists. It, however, the injury was caused by  
216 negligence to which the injured workman contributed, the liability of the employer remains to an amount of the full damages less the amount of damages attributable to the employer's negligence. In other words, the damages are to be apportioned to the parties, employer and employee, as the negligence attributable to the one is to the negligence attributable to the other. Paragraph 3159, Civil Code of Arizona, 1913. "The fact (appearing) that the employee

may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee," are the words of the statute. The statute is in full harmony with the constitutional mandate and with its restriction.

The defendant set forth in its answer the contributory negligence of the plaintiff consisting of the manner in which the plaintiff was performing his duties at the time of the accident, but defendant's answer does not set forth any claim for a reduction of

217 damages by reason of such negligence, but claims such contributory negligence as a complete, not a partial, defense to the action. The answer is evidently interposed upon the theory of the common-law rule of contributory negligence in bar of the cause of action. Under the provisions of Chapter VI, supra, nothing less than the sole negligence of the employee injured will bar an action based on the statute for damages. Negligence of the employee contributing to the injury may serve to reduce the amount of the recovery but will not bar recovery.

The defendant having in its answer admitted that its negligence in part was the cause of the damages, by setting forth a charge of contributory negligence against the plaintiff authorized a verdict against defendant in any event. The matters left open for inquiry were, the amount of the damages the plaintiff was entitled to recover as measured by the allegations of the complaint and the evidence, and, whether the accident was due to a condition or conditions of

218 the employment and such as is unavoidable.

The appellant complains that the amount of damages found is excessive and out of all proportion to the nature, extent and seriousness of the injury, to the loss of time, wages, or future earning capacity, to the amount necessary to effect a recovery, to his station in life and to his pain and suffering. No complaint is made that the evidence does not sustain the verdict. The specific complaints are made that the jury asked questions of witnesses during the progress of the trial; and the members of the jury were permitted to and did examine the plaintiff's injured hand and touched and pressed his wounded fingers, and the members of the jury were thereby prejudiced, which prejudice resulted in a verdict for excessive damages.

With regard to the first complaint made, the abstract of record discloses that counsel for defendant invited the jury to ask questions of witness Massey. Thereafter the jurors freely asked questions of other witnesses. The record discloses no objection was 219 offered by the defendant to any question asked by any juror of any witness. The practice of allowing attorneys, parties, the judge, and jurors to examine witnesses in a disorderly manner has a tendency to break down the decorum becoming the sanctity of a trial and should be discouraged. The proper dignity of the court required orderly procedure in a trial of the cause to be strictly observed. The liberty or property of litigants is involved in the result of every law suit, and the trial of such rights may result in tragedy to some interested human being. Certainly a tragedy results from error committed, never comedy. The purpose of a lawsuit is to determine the

exact rights of the parties thereto and enforce such exact rights. The wisdom of ages of experience has served to teach our profession that the observance of the prescribed rules of procedure more nearly discover the exact rights of parties than haphazard, disorderly procedure. Not every departure from orderly trial procedure justifies a reviewing court in reversing a judgment because of irregular trial procedure. The irregular procedure must have prejudiced the rights of the party complaining before an appellate court is justified in disturbing a judgment. We must presume that no harm befell the defendant by reason of the many questions asked the witnesses on this trial, for the reason the defendant first invited the asking of the questions, and at no time during the trial objected to that form of procedure.

The appellant contends that the questions asked the witnesses by the jurors conclusively indicate a prejudice against this defendant, inducing an excessive verdict for damages. The nature of the questions called for answers giving information covering a wide field of inquiry, and were not confined to testimony bearing upon the amount of damages. The questions were largely confined to detail matters connected with the knowledge of the witness with regard to which he had testified, the credibility of the witness, and his means of knowledge of the matter with respect to which he gave testimony. The jurors had a very good reason to test the witness' means of knowledge of these matters and the test given indicates no prejudice against defendant. This particular matter was not insisted upon as a ground for a new trial and is first raised on this appeal. For that reason the objection must be overruled. The verdict does not conclusively appear to have been reached through prejudice and bias, nor induced by passion and prejudice.

The appellant contends that by permitting the jurors to examine plaintiff's wounded hand and fingers, and during such examination to squeeze and press his hand for the purpose of discovering the present sensitive condition of the fingers was error and resulted in causing the jury to return a verdict for excessive damages. The appellant nowhere contends that the evidence thus gained by the jury was false. If as a fact the plaintiff's wounds remained sensitive and prevented plaintiff from earning a living, and the jury ascertained that fact from personal physical examinations and by experimenting with the wound, no harm resulted to appellant simply by the use of the means complained of in arriving at the fact. Appellant did not object to the examinations when being made by the jury and cannot now complain of the character of the evidence used to establish the fact.

While the record discloses many departures from the ideal trial of a law suit, these departures were consented to, acquiesced in, submitted to, or indulged, by appellant without objection, and do not appear affirmatively upon the record to have worked a prejudice to appellant's rights. The verdict returned is large in amount, but that matter lay with the jury. No question is made that the verdict is not sustained by substantial evidence.

Upon the whole case I am of the opinion the record contains no reversible error. Consequently the judgment must be affirmed.

(Signed)

D. L. CUNNINGHAM, *Judge*.

FRANKLIN, C. J. (concurring):

The demonstrations permitted before the jury in this case rather exceeded the limits defined in such matters, but here as in  
 223 predicated error on allowing the jurors to propound objectionable questions appellant is estopped because a similar demonstration was made at the request of appellant. With regard to the excessiveness of the damages, where there is a personal injury permanent in its character there is much difficulty in measuring compensation for it by strict and definite rules, and, therefore, it must be left largely to the sound judgment of a jury and the trial judge. As a result of this accident the index and second finger of plaintiff's hand were amputated at the first joint and the third finger amputated just a little above the first joint, causing the nerves to be caught in the flesh and healed in the scar tissue causing neuritis and resulting in severe and constant pain to relieve which condition another operation under an anæsthetic would be necessary. The jury found a verdict for eight thousand dollars (\$8,000) which was upheld by the trial judge on motion for a new trial. The verdict appears somewhat large, but that it is larger than the appellate court would give or that the appellate court would be better satisfied with a smaller  
 224 verdict—these are not the criteria by which we are guided in reversing a case and ordering a new trial because of an excessive verdict. This court is restrained from so doing unless our minds are satisfied that from the large amount of the verdict the jury arrived at it because of passion, prejudice, partiality or corruption on their part. In view of the principles which restrain the court in such a matter, and especially having the refusal of the trial court on motion for a new trial to interfere, I do not think this court is authorized or would be justified in reversing the case on that ground.

See Ann. Cas. 1913 A, 1362.

Counsel for appellee does not oppose a remitter of some portion of the verdict which this court might deem excessive as a condition of denying a new trial, but I have not considered the power of this court to do so under Section 578, Revised Statutes 1913, or the propriety of its exercise here, because appellant on argument expressly asked  
 the court not to order a remitter if it was not of opinion that  
 225 a new trial should be granted without such condition. I, therefore, concur in affirming the judgment.

(Signed)

ALFRED FRANKLIN,

*Chief Justice.*

Ross, J: (dissenting):

I dissent. Later I will file my reasons.

(Signed)

HENRY D. ROSS, *Judge*.

Endorsement: Filed July 2, 1917. C. F. Leonard, Clerk Supreme Court.



*(Dissenting Opinion.)**(Title of Court and Cause.)*

Ross, J.:

I endeavored to show in my dissenting opinion in *Inspiration Consolidated Copper Company v. Mendez*, 166 Pac. 278, that the new right of action contemplated by Sec. 7, Art. 18 of the Constitution and for which the legislature was directed to provide, by proper legislation, is not and could not be an action for damages for  
 226 personal injury according to the standards of the common law. The procedure adopted by the legislature to enforce the right is according to the common law rules and standards of damages in case of tort, but the right of action itself finds no prototype in the common law. It is in its essential features the same right of action upon which compensation for injury is justified by the courts. If the injury be "due to a condition or conditions of the occupation," then it cannot be due to the negligence of either the employer or employee. If it be due to the negligence of the employer, the injured employee or his dependents should pursue the common law remedy for damages in tort or accept compensation under the Workmen's Compensation Act. If it be caused by the negligence of the employee, his only recourse is compensation under the Workmen's Compensation Act.

Recovery was had in the present case upon the theory that although the injury was due to a condition or conditions of  
 227 the occupation without any fault of either the employer or employee, the damages should be ascertained and measured by the standards of the common law action for negligence following the legislative formula. The error was in applying the old common law remedy to the new right—in dressing this new and up-to-date creature of the law with habiliments two or more centuries old.

If this new right of action arises only in case of an unavoidable accidental injury in which neither the employer nor employee is to blame or at fault, the liability, in order to conform to due process of law and afford equal protection of the law should be ascertained and measured according to the rules adopted by the different systems of compensation law.

*New York Central R. Co. v. White*, 243 U. S. 188, 61 L. Ed. —, 37 Sup. Ct. 247;

*Mt. Timber Co. v. Washington*, 243 U. S. 219, 61 L. Ed. —, 37 Sup. Ct. 260;

*Hawkins v. Bleakly*, 243 U. S. 210, 61 L. Ed. —, 37 Sup. Ct. 255.

The legislature misapprehended its duty and misconceived  
 228 its powers when it provided that contributory negligence and assumption of risk could be interposed to an action based upon an injury without fault. The constitutional mandate neither in direct terms, nor by implication authorizes these defenses. On

the contrary the very definition of the right of action foreshadowed and intended to be created, excludes them as defenses. The injury to be actionable under this law, must have been "caused by an accident due to a condition or conditions of such occupation," and not by any negligence. Assumed risk is a species of contributory negligence, in that one who takes employment in a dangerous or hazardous occupation whether inherently so or by reason of the employer's negligence, of which he has knowledge, may be said to have contributed to his own injury from the mere fact of working under such conditions.

We have the legislature (and the majority opinion approves it) announcing the paradoxical and strangely absurd rule that if the accident is caused by contributory negligence, that is, negligence of both the employer and the employee, "the damage shall be  
229 diminished by the jury in proportion to the amount of negligence attributable to such employee." Whereas, the employer, innocent of wrong, guilty of no fault, for accidents inherent and unavoidable, must pay the whole toll. He must pay more than the one whose negligence contributed to the injury. The legislature and the court unite in awarding some immunity to an employer whose negligence contributes to the injury, and since injuries must occur,—are inevitable,—in order to secure any reduction of the damages, the employer is encouraged to contribute thereto or failing in actually being guilty of negligence, estop himself from denying it by pleading contributory negligence in his answer as in the present case.

The large verdict in this case is only illustrative of what is likely to happen in any case. It is but reasonable to infer from what both my colleagues say in their opinions that they believe the verdict excessive. The learned counsel of appellee, at the oral argument, admitted that the verdict was too large by consenting to a  
230 remitter. It will generally, if not always be so, under a law that makes the employer without fault liable in damages measured by common law standards. Whether influenced by bias and prejudice or not as contended by appellant in this case, the jury will always award damage for mental and physical suffering, elements of damages, as Justice Pitney says in the *White* case, not chargeable to the employer without fault. The verdict and judgment here emphasize the absolute necessity of compensation in such cases "according to a reasonable and definite scale." If it is not so regulated, it will generally be "so insignificant on the one hand or onerous on the other" as to shock the conscience of the ordinary disinterested person.

The criticism therefore is directed, not at compensation where there is no fault, but at the method or procedure used in ascertaining the compensation.

(Signed)

HENRY D. ROSS, *Judge*.

Endorsement: Filed: September 19, 1917. C. F. Leonard, Clerk Sup. Ct.



231 And on the same day, towit, the 2nd day of July, 1917, being one of the regular juridical day- of the said Supreme Court, the following Order and Judgment was had and entered of record in said cause in words and figures as follows, towit:

At this day it is ordered, that the judgment of the lower court made and entered in this cause be and the same is hereby affirmed, Judge Ross dissenting.

It is further ordered, adjudged and decreed, that Frank Tomich, sometimes known as Frank Thomas, appellee herein, do have and recover of and from Superior and Pittsburg Copper Company, a corporation, appellant herein, as principal, and J. E. Curry and M. J. Brophy, sureties on supersedeas bond herein, the principal sum of Eight Thousand (\$8,000) Dollars, together with interest thereon at the rate of six per cent per annum from the 29th day of February, 1916, until paid, together with his costs in the lower court in this cause incurred, amounting to One Hundred Six and 25/100  
232 (\$106.25) Dollars, and his costs in this Court in this cause incurred.

(Title of Court and Cause.)

*Motion for Rehearing.*

Comes now the appellant in the above entitled cause and moves the court that a rehearing of this cause be granted it upon the decision herein rendered upon the 2nd day of July, 1917, upon the grounds and for the reasons as follows, to-wit:

I.

. That this court, in holding that the Employers' Liability Law of Arizona, being Chapter 6 of Title 14, Revised Statutes of Arizona, 1913, does not contravene Section 1 of Amendment 14 to the Constitution of the United States of America, and does not deprive appellant of its property without due process of law, and does not deny to it the equal protection of the law by imposing absolute un-  
233 limited liability upon it as an employer for personal injury sustained by its employees while in its employ without regard to and in the absence of any negligence or neglect of duty, nor of care or default upon its part whatsoever, (and so holding said law to be constitutional with respect to the constitution of the United States and the amendments thereto), has reached this decision by reason of misapprehension of the law applicable to and governing the determination of these issues and questions, and by reason of misapprehension of the record in this cause, and is in error in its decision of said issues and questions.

This court bases its decision upon said foregoing issues and questions upon said decision rendered in the case of Inspiration Consolidated Copper Company vs. Mendez, 19 Arizona —, in which case this court bases its said decision upon the authority of the case of

the New York Central Railroad Co. vs. White, Advance Opinions, 1916, page 247 (not yet reported), a careful examination of which discloses the clearly defined distinction and difference between the issues in this case and those presented in case of Inspiration Consolidated Copper Co. vs. Mendez, 19 Arizona —, and the issues presented and determined in said case of New York Central Railroad Co. vs. White, which latter are foreign to the former, all and singular, and in no sense or manner are relevant or pertinent thereto, nor determinative nor authoritative thereof.

In this cause and in the Inspiration case the validity and constitutionality of an Employers' Liability law was the issue presented for determination. In the case of the New York Central Railroad Co. vs. White, the validity and constitutionality of an Employees' Compulsory Compensation law was the issue presented for determination. These are respectively, enactments, not of the same, but of distinct and separate class, upon the face of each apparent. The basic theories and principles from which each of these classes of enactments spring, and upon which each of them respectively rests are so obviously divergent and so set in apposition, the one to the other, that authority determinative of the one class cannot be said to be relevant to or determinative of the other class.

It is clear from the discussion contained in the New York Central case of the theory upon which Compulsory Compensation laws are sustained (and from the authorities collected in said case), doing violence as they do to the ancient principle that there can be no liability without fault, that this class of legislation is sustained by reason of judicial recognition of the necessity for meeting the industrial conditions of society existing in the present stage of human progress, effort and development. In general the conditions designed to be remedied have been the following. The ruinous economic waste attendant upon personal injury litigation between employer and employee, entailing the cost and expense of protracted litigation, the uncertainty of the amount of recovery, the lack of uniformity of the amount of recovery for injuries of like degree, and the many cases in which at common law no recovery could be had, by reason of the purely accidental cause or nature of the injury, where no one is at fault no liability attaches, and the existence of a bar to recovery in many cases because of the presence of contributory negligence, the application of the doctrine of assumption of risk, or the fellow-servant doctrine.

Hence the existing Compulsory Compensation enactments, which in like manner as the New York Act under discussion in the New York case, embodies, in all cases of injury (with certain exceptions not material to this inquiry) sustained by employees engaged in what are known as hazardous occupations, in the course of such employment, liability according to a fixed scale, in the nature of Compensation, based upon the degree of the injury and upon the resultant loss to the injured, calculated upon the earnings of such injured person. In no such law known to jurisprudence is unlimited liability known or recognized, arbitrarily arrived at in the absence of fault upon the part of the employer, and no such

legal situation was presented in the New York Central case, and nowhere in civilization does *and* enactment exist that seeks to impose arbitrarily unlimited liability in the absence of fault upon the part of the person so sought to be subjected to such liability, which thus works a deprivation of property without due process of law, and thus denies to such person the equal protection of the law, save and except in the anomolous case of the Employers' Liability Law of Arizona, being Section 6, Title 14, Revised Statutes of Arizona, 1913.

But so this enactment does, by its express terms, and this unique legal stipulation, *sui generis*, was not in issue in the New York Central case, and was not considered by the court, the decision of which

237 far from holding such an enactment valid and not in contravention of Section 1 of Amendment 14 to the constitution of the United States, specifically indicates that such an enactment transcends and exceeds the limit beyond which legislation may not go, and as clearly indicates that such an enactment would be held insupportable, and we direct the Court's attention to the case of New York Central Railroad Co. vs. White, Advance Opinions, U. S. 1916, page 247.

Page 252, bottom:

"On the other hand, if the employer is left without defense respecting the question of fault, he at the same time is assured that the recovery is limited, and that it goes directly to the relief of the designated beneficiary, and just as the employees' assumption of ordinary risks at common law, presumably was taken into account in fixing the rate of wages, so the fixed responsibility of the employer and the modified assumption of risk by the employee, under the new system, presumably will be reflected in the wage scale. The act evidently is intended as a just settlement of a difficult problem affecting one of the most important of social relations, and it is to be judged in its entirety. We have said enough to demonstrate that in such an adjustment the particular rules of the common law affecting the subject matter are not placed by the 14th Amendment beyond the reach of the law making power of the state, and thus we are brought to the question whether the method of compensation that is established as a substitute transcends the limits of permissible State action."

Further, on same page, the court says:

"Of course we cannot ignore the question whether the new arrangement is arbitrary and unreasonable from the standpoint of natural justice."

238 Near the middle of page 253 the court further says in this connection:

"The provision for Compulsory Compensation in the act under consideration cannot be deemed to be an arbitrary and unreasonable application of the principle, so as to amount to a deprivation of the employer's property without due process of law."

Further the court says, near the bottom of page 253:

"Viewing the entire matter it cannot be pronounced arbitrary and unreasonable for the State to impose upon the employer the absolute duty of making a moderate and definite compensation in

money to every disabled employee, or in case of his death, to those who are entitled to look to him for support, in lieu of the common law liability confined to cases of negligence."

And continuing from the top of page 254, the court says:

"This of course is not to say that any scale of compensation, however insignificant, on the one hand, or onerous, on the other, would be supportable. In this case no criticism is made on the ground that the compensation prescribed by the statute in question is unreasonable in amount, either in general or in the particular case. Any question of that kind may be met when it arises."

The court clearly recognizes the existence of a limit beyond which legislation is so abhorrent to justice, so arbitrary and without legal justification, and confiscatory to such extent that it is in contravention of Sec. 1, Amendment 14 to the Constitution of the United States.

239 The court characterizes the very features already discussed contained in Chapter 6, Title 14, Revised Statutes of Arizona, 1913, as constituting these fatal matters, repugnant to the fundamental principles of our jurisprudence and the solemn guarantee contained in the Federal Constitution.

## II.

That this court omitted to consider or pass upon, and did fail wholly to consider or pass upon in its decision of this cause the proposition presented in Appellant's Assignment of Error 1 (Appellant's Brief, pages 8-9, folios 24-26; pages 21-45, folios 62-134); that Chapter 6, Title 14, Revised Statutes of Arizona, 1913, is in contravention of Sec. 1, Amendment 14 to the Constitution of the United States, for the reason that the same by imposing unlimited liability upon Appellant as an employer for personal injury sustained by its employees while in its employ, in the absence of any fault upon its part, denies to Appellant the equal protection of the law.

## III.

That this court, in holding that the Employers' Liability Law of Arizona, being Chapter 6, Title 14, Revised Statutes of Arizona, 1913, does not contravene Secs. 5 and 7 of Article 18 of the  
240 Constitution of the State of Arizona (and so holding said act to be constitutional with respect to the Arizona Constitution), has reached this decision by reason of misapprehension of the law applicable to and governing the determination of the issues and questions, and by reason of misapprehension of the record in this cause, and is in error in its decision of said issues and questions.

Sec. 5 of Article 18 of the Constitution of Arizona characterizes the plea of contributory negligence as a defense. It must necessarily be such, and was necessarily a present defense when the constitution was adopted and could not be abrogated by a subsequently enacted statute. Being a defense recognized by constitutional enactment, it was a defense unqualified in its limit, and can only be

given its effect and status as established in law then existent, which effect and status could only be that of a bar when established to a jury to whose exclusive province it is committed, and it is by this constitutional enactment, preserved and made available in all cases whatsoever, that is to say, in all cases where recovery should be there-

after sought for personal injury, contributory negligence  
 241 presupposing an action for personal injury. Being a defense, such a plea when established, constitutes a bar, and it is beyond the limit of subsequent statutory enactment to deprive such plea of its constitutional status and transform it from a defense into a circumstance in mitigation and reduction of the recovery.

Now the constitutional mandate calling for subsequent enactment of an Employers' Liability law, being Sec. 7 of Article 18 of the constitution of Arizona, limits the function and application of such law to those cases of injury wherein the employee was not or is not negligent. The existence of negligence upon the part of the employee is specifically negatived in plain, unambiguous, unequivocal language, in defining the scope and application of the Employers' Liability Law authorized in such mandate. No law was authorized to contemplate or comprehend or embrace those cases of injury wherein negligence upon the part of the employee had any existence. Negligence may exist upon the part of the employee so as to be the sole and only cause of his injury, or negligence may exist upon the part of such employee so as to be a contributing cause to his injury, and must be coupled with the accompanying negligence of the employer. In both of the cases just stated negligence

242 exists upon the part of the employee, but negligence different in degree. The mandate of the constitution does not distinguish between degrees in which negligence exists. It authorizes the enactment of a liability law for those cases wherein negligence upon the part of the employee does not exist and so this court holds in the case of Inspiration Consolidated Copper Co. vs. Mendez, hereinbefore cited. The language of the mandate is plain, clear and unambiguous. It calls for no construction under any known canon, and to extend its authorization to cover classes of injury where negligence or contributory negligence upon the part of the employee exists is to extend the limit defined by the plain verbiage of the mandate beyond the reasonable meaning of its terms and to do violence to the principle laid down by this court in the case of Boehringer vs. Inspiration Company, 17 Arizona 232.

#### IV.

That this court in holding that a verdict was authorized to be returned against Appellant, because a plea of contributory negligence was interposed in bar of Appellee's right to recover, this constituting an admission of negligence upon the part of  
 243 Appellant, reached this decision by reason of misapprehension of the law applicable to and governing the determination of such issues, and by reason of misapprehension of the record in this cause, and is in error in its decision of said issues.

We would respectfully urge to this court that such plea cannot by any possibility in law in this action, either constitute an admission of negligence upon the part of Appellant, or that even if it could, it could not authorize the returning of a verdict against Appellant in this cause.

This is a legal impossibility. The present action was brought under the Employers' Liability Law, Chapter 6, Title 14, Revised Statutes of Arizona, 1913, in which negligence under the very terms of the enactment is not an element and does not exist, and no recovery can be based upon negligence upon the part of the employer in such action, and it is so held by this court in the case of Consolidated Arizona S. Co., vs. Ujack, 15 Arizona 382, and in the case of Inspiration Consolidated Copper Company vs. Mendez, 19 Arizona —. Negligence upon the part of the employer resulting

in injury is not recoverable in this action, but must be recovered for in a separate and distinct action, so the Ujack case says. In this action, brought by appellee, negligence upon the part of Appellant, as an employer, has no existence, and is not an element, so says the Inspiration case. Then how, we respectfully submit, can Appellant admit something that has no existence in his cause of action so as to authorize a verdict that under the law of this court cannot be returned in such action?

Negligence upon the part of the employer must be recovered for in a separate and distinct cause of action. Appellee had a perfect right to bring, and he did attempt to join such action with the cause of action here prosecuted, but which he voluntarily abandoned. If we are to indulge in presumptions, it not reasonable to presume that such action was abandoned because to appellee's own knowledge there was no negligence upon the part of Appellant in all the facts upon which he sought to recover?

Shall Appellee prosecute and try one cause of action and on appeal in this court seek to be accorded advantage of the supposed existence of a constituent element of another and different cause of action, and an element foreign to and which does not exist in the case at bar? We respectfully submit the rectitude of our position and pray for consideration and relief.

## V.

That this court in holding in its opinion that "no complaint is made that the evidence does not sustain the verdict," has reached its decision by reason of misapprehension of the law applicable to and governing this proposition, and by reason of misapprehension of the record in this cause, and is in error in its decision upon this proposition, and we refer the court to Sec. 4 of Appellant's Assignment of Error 10; Sec. 5 of Appellant's Assignment of Error 10; Sec. 6 of Appellant's Assignment of Error 10, appearing in Appellant's Brief, at pages 18-19, folios 53-55; pages 47-51, folios 139-153.



## VI.

That this court, in holding that the asserted presence of prejudice and passion induced an excessive verdict in this cause was not insisted upon as grounds for a new trial, but was first raised on this appeal to you, has reached this decision through misapprehension of the law applicable to and governing this proposition, and by reason of misapprehension of the record in this cause, and is

246 in error in its decision upon this proposition, and we respectfully submit grounds 15-16 and 17 of Appellant's Motion for New Trial, Abstract of Record page 17, folios 50-51, Sub-division 5 of Section 584, Revised Statutes of Arizona, 1913, Section 15, 16 and 17 of Appellant's Assignment of Error 10, Appellant's Brief page 20, folios 58-60, and the argument thereunder; Appellant's Brief, pages 54 to 83, folios 160 to 247, which matters are duly assigned as grounds for new trial in the very words of the statute.

## VII.

That this court in holding that it must be presumed that no harm will befall Appellant by reason of the free questioning of witnesses by the court and jury evidencing bias and prejudice because Appellant did not object to the same and resist both the Court and jury, but openly invited full examination into all of the facts in good faith has reached its decision through misapprehension of the law applicable to and governing this proposition, and by reason of misapprehension of the record in this cause, and is in error in its decision upon this proposition.

247 Must a defendant be thus penalized for fairly and in good faith declining to assume the attitude of concealment and unwillingness to bare all facts before a court and jury which throw any light upon the cause? What a damaging stand must he thus be forced to take before his judges. Then when such an inquiry is pursued by the court and jury passion and prejudice is pregnant in every interrogation not justified by a shred of testimony in the record contained, and a verdict so apparently excessive and out of proportion to the degree of injury sustained, to such extent that it is abhorrent to a sense of natural justice is returned, so clearly influenced by the extraordinary state of mind evidenced by the jury in this case, must such a defendant be denied relief because it did not set itself in resistance to the trial jury, being at its mercy, and thus further influence the existant bias? Can we take the repeated, voluntary, uncalled for, unmerited expressions establishing this bias beyond controversy out of this case and say that it does not exist and obliterate its effect because the defendant did not assume the attitude of unfairness, hostility and concealment before the jury in the trial of this cause? Certainly it is the ex-

248 istence of prejudice and bias and its effect that a defendant is entitled not to suffer for, and the fact that defendant did not combat the jury should not be permitted by every considera-

tion of natural justice to deprive it of a fair and impartial trial. We, in all earnestness, respectfully submit this to your Honors. We do not desire to again, in detail, assemble from the pages of the record the considerable number of these incidents of clearly expressed bias. They stand out unmistakably, it would serve no useful purpose to tabulate them for the second time, or to enter into a further discussion of the same, but we would again respectfully refer the court to pages 54 to 83, folios 160 to 247 of Appellant's Brief, where the same have been in detail heretofore presented, and in all earnestness we respectfully submit that this abnormal situation presented calls for merited relief.

### VIII.

That the court in holding that the Appellant is entitled to no relief because it does not "conclusively" appear that the verdict was influenced by passion and prejudice has reached its decision upon this proposition by reason of misapprehension of law applicable to 249 and governing same, and by reason of misapprehension of the record in this cause, and is in error in its decision upon this proposition, we respectfully submit that to require Appellant to conclusively establish such a state of facts is a burden that perhaps can never be carried by any defendant or appellant at any time under any state of facts imaginable, and puts any party litigant beyond possibility of relief, however, unfair the trial has been to which he was subjected, or however, apparent such matters may be upon the face of the record, there might always exist some ground for holding a contrary opinion, and though such features were established to the satisfaction of any reasonable man upon the record and call for relief, no injustice could be remedied because the absolute property of conclusiveness is almost universally absent from human affairs generally, and from litigation in particular. It has heretofore appeared to be the law of Arizona that if it appears from an examination of the entire case that the verdict returned has been influenced by passion and prejudice it should be set aside and a new trial granted, and in such case no remittitur should be ordered. We submit the case of S. P. Co. vs. Tomlinson, 4 Arizona 126; S. P. Co. vs. Fitchett, 250 9 Arizona 128; Gila Valley Railroad Co. vs. Hall, 13 Arizona 276.

### IX.

That this court in holding that the verdict was not excessive, and that the determination of such action is for the exclusive province of the jury (or in the words of the Court, "the verdict returned is large in amount, but the matter lay with the jury.") and that no complaint was made that the verdict was not sustained by substantial evidence has reached its decision upon these propositions by reason of misapprehension of the law applicable to and governing the same, and by reason of misapprehension of the record in this cause, and is in error in its decision upon these propositions. We respect-



fully submit that complaint is made that the verdict is not sustained by substantial evidence, Appellant's Brief page 81, folios 239-244.

That it is not within the exclusive province of the jury as to which the Appellate Court may not inquire and grant proper relief, to finally determine the amount of recovery; we respectfully refer the court to *laeger vs. Metcalf*, 11 Arizona 290; *McGill vs. S. P. Co.*, 4

Arizona 116, which principle is clearly recognized in the specially concurring opinion of Chief Justice Franklin, filed in this cause.

Complaint is not made merely that the verdict is excessive in amount only, but that it is so excessive and influenced by passion and prejudice. We respectfully refer the court to Sections 15, 16 and 17 of Appellant's Assignment of Error 10; Appellant's Brief page 20, folios 58-60, pages 80-81, folios 239-244, and in such situation, which we submit in all earnestness that the record sustains, the verdict should be set aside and a new trial granted. *S. P. Co. vs. Fitchett*, 9 Arizona 128; *S. P. Company vs. Tomlinson*, 4 Arizona 126; *Gila Valley Railroad vs. Hall*, 13 Arizona 276.

And no remittitur is proper to be ordered if from an examination of the whole case the verdict appears to have been influenced by passion and prejudice.

That the court has the undoubted right to so order a remittitur cannot be questioned, whether Sec. 578, Revised Statutes of Arizona, 1913, (referred to in specially concurring opinion of Chief Justice Franklin in this cause) exists or not, but we respectfully represent

to this court that under the authorities herein presented, and upon the state of the record in this cause, where bias and prejudice has so obviously influenced a verdict excessive upon its face, that a remittitur should not be countenanced as it is very justly held improper by the courts. Appellant's counsel, in the argument in this cause, according to his best recollection, does avow that he urged as strenuously as he was able the utter impropriety of a remittitur in such a case as this. He did not defy the court to order such, but believing it under the state of all of the law to be improper, so argued.

Section 578, Revised Statutes of Arizona, 1913, does not, we take it, enlarge upon the power of this court in the matter of a remittitur, nor does it render the same necessary in any improper case, but leaves the court with the same degree of power that it possessed before such section had any existence as an enactment. When a verdict is merely excessive in amount it cannot be denied that a remittitur and not a new trial is proper, but where the element of prejudice or bias has entered into the rendition of a verdict, we believe the courts are unanimous in holding that a party litigant who has been subjected to such a verdict is entitled to a fair and impartial trial, at which damage may be fairly assessed against him, and we know of no method whereby such a party may be accorded his rights under the law other than by a new trial, and Appellant's counsel urged the court, in all earnestness, that a new trial be granted it. The amount of the verdict in this case even shocked the conscience of Appellee, as the Appellee appeared to be quite willing that

a remittitur should be ordered, as stated in the specially concurring opinion of Chief Justice Franklin in this cause.

And we respectfully submit that we are entitled to a new trial, that we may have a fair and impartial one, and so, we earnestly and respectfully pray that our motion for a rehearing be granted upon the grounds herein contained, all and singular.

CLEON T. KNAPP,  
C. R. WOODS,  
BOYLE & PICKETT,  
*Attorneys for Appellant.*

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(Title of Court and Cause.)

*Affidavit of Service of Motion for Rehearing.*

STATE OF ARIZONA,

County of Cochise, ss:

C. R. Woods, being first duly sworn, upon his oath deposes and says that he is one of the attorneys for the Appellant in the above entitled cause, that upon the 16th day of July, 1917, he did serve a true and correct copy of the hereto attached Motion for Re-hearing upon J. T. Kingsbury, one of the attorneys for the Appellee in the above entitled cause in the following manner, to-wit:

That he did on said date deposit a true and correct copy of said motion for rehearing in the United States post office at Bisbee, Arizona, enclosed in a sealed envelop-, addressed to J. T. Kingsbury at his place of residence in Tombstone, Arizona, having first prepaid the postage thereon, there then and there being regular communication by mail between Bisbee and Tombstone, Arizona.

C. R. WOODS.

255 Subscribed and sworn to before me this 17th day of July, 1917.

[SEAL.]

C. F. LEONARD,  
*Clerk Supreme Court.*

Due service by true copy is hereby admitted at Bisbee, Arizona, this 16th day of July, 1917.

J. T. KINGSBURY,  
FRED SUTTER,  
*Attorneys for Appellee.*

Filed July 17th, 1917. C. F. Leonard, Clerk Supreme Court.

256 And on, towit, the 25th day of September, 1917, being one of the regular juridical days of the said Supreme Court, the following Order was had and entered of record in said cause, in words and figures as follows, towit:

At this day it is ordered, that the Motion for Rehearing filed herein by Appellant be and the same is hereby denied.

*Mandate.*

In the Supreme Court of the State of Arizona.

[SEAL.]

To the Honorable the Superior Court of the State of Arizona in and for the County of Cochise, Greeting:

Whereas, lately in the Superior Court of the State of Arizona in and for the County of Cochise, before you in a cause between Frank Tomich, sometimes known as Frank Thomas, Plaintiff, and Superior & Pittsburg Copper Company, a corporation, Defendant, No. 1007; wherein the judgment of the said Superior Court, made and entered therein on the 29th day of February, 1916, is in the following words, viz:

257 "This cause came on regularly for trial on the fifteenth day of February, 1916. Fred Sutter and J. T. Kingsbury appeared as counsel for plaintiff; and Knapp & d'Autremont and H. E. Pickett appeared as counsel for defendant. A jury of twelve persons was regularly impaneled and sworn to try said action. Witnesses on the part of plaintiff and defendant were sworn and examined. After hearing the evidence, the arguments of counsel, and the instructions of the Court, the jury retired to consider of their verdict, and subsequently returned into Court, with the verdict signed by the foreman, and, being called, answered to their names; and the foreman delivered to the Court the verdict so signed, which said verdict the Court received, and caused to be read and recorded, and which said verdict was in words and figures as follows, to-wit:

'In the Superior Court, County of Cochise, State of Arizona.

FRANK TOMICH, Sometimes Known as FRANK THOMAS, Plaintiff,

vs.

SUPERIOR & PITTSBURG COPPER COMPANY, Defendant.

*Verdict.*

258 We, the Jury, duly empaneled and sworn in the above entitled action, upon our oaths do find: for the Plaintiff in the sum of \$8,000, Eight Thousand Dollars.

F. B. STEELE, Foreman.'

"Wherefore, by virtue of the law, and by reason of the premises aforesaid, it is ordered, and adjudged, and decreed, that said plaintiff have and recover from said defendant the sum of Eight Thousand Dollars (\$8,000.00), lawful money of the United States, with legal interest thereon from date hereof until paid, together with plaintiff's

costs and disbursements incurred in this action, amounting to the sum of One Hundred Six and Twenty-five-One-Hundredths Dollars (\$106.25).

"Done in open Court this 29th day of February, 1916.

ALFRED C. LOCKWOOD, *Judge*";

as by the inspection of the record of the said Superior Court, which was brought into the Supreme Court of the State of Arizona by virtue of an appeal by the Defendant agreeably to the law in such cases made and provided fully and at large appears.

259 And whereas, in January, in the year of our Lord one thousand nine hundred and seventeen, the said cause came on to be heard before the said Supreme Court.

On consideration whereof, it was on the second day of July, in the year of our Lord one thousand nine hundred and seventeen, ordered by this Court that the judgment of the said Superior Court in this cause be and the same is hereby affirmed, Judge Ross dissenting.

It is further ordered, adjudged and decreed, that Frank Tomich, sometimes known as Frank Thomas, appellee herein, do have and recover of and from Superior and Pittsburg Copper Company, a corporation, appellant herein, as principal, and J. E. Curry and M. J. Brophy, sureties on supersedeas bond herein, the principal sum of Eight Thousand (\$8,000) Dollars, together with interest thereon at the rate of six per cent per annum from the 29th day of February, 1916 until paid, together with his costs in the lower court in this cause incurred amounting to One Hundred Six and 25/100 (\$106.25) Dollars, and his costs in this Court in this cause incurred.

260 You therefore are hereby commanded that such proceedings be had in said cause as according to right and justice, and to law, ought to be had, the said appeal notwithstanding.

Witness, the Honorable Alfred Franklin, Chief Justice of the Supreme Court of the State of Arizona, the sixth day of October, in the year of our Lord one thousand nine hundred and seventeen.

(No cost bill filed.)

C. F. LEONARD,  
*Clerk of the Supreme Court of the  
State of Arizona.*

Filed: Oct. 8, 1917. J. E. James, Clerk Superior Court.

261 In the Supreme Court of the State of Arizona.

No. 1535.

SUPERIOR & PITTSBURG COPPER COMPANY, a Corporation, Plaintiff  
in Error,

VS.

FRANK TOMICH, Sometimes Known as FRANK THOMAS, Defendant  
in Error.

*Petition for Writ of Error.*

To the Hon. Alfred Franklin, Chief Justice of the Supreme Court of  
the State of Arizona:

262 Comes now the Superior & Pittsburg Copper Company, a corpora-  
tion, the plaintiff in error above named, and respectfully  
shows by this petition, in this its petition for writ of error,  
the following matters and things, to-wit:

I.

That in the above entitled cause, upon the 2nd day of July, 1917,  
the Supreme Court of the State of Arizona, the same being the high-  
est court of said State in which a decision could be had in this suit,  
did, in said cause, render its judgment and decision in favor of  
Frank Tomich, sometimes known as Frank Thomas, the above  
named defendant in error, and against the Superior & Pittsburg  
Copper Company, a corporation, the above named plaintiff in error.

II.

That upon the 17th day of July, 1917, said plaintiff in error did  
file in the Supreme Court of the State of Arizona, in the above en-  
titled cause, its proper motion for rehearing.

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III.

That upon the 25th day of September, 1917, the Supreme Court  
of the State of Arizona did render and enter its order denying and  
overruling said motion for re-hearing of said plaintiff in error,  
whereupon, upon said last mentioned date, the judgment of the  
Supreme Court of the State of Arizona, in the above entitled cause,  
did become final.

IV.

That, as appears in the record and proceedings in the Supreme  
Court of the State of Arizona, in the above entitled cause, there was  
drawn in question the validity of Chapter 6 of Title XIV of the

Revised Statutes of Arizona, 1913, known as "The Employers' Liability Law of Arizona," upon the ground that the same is and was repugnant to, in contravention of and in violation of the constitution of the United States of America in this, to-wit: That there was drawn in question the validity of said Chapter 6 of Title  
264 XIV, Revised Statutes of Arizona, 1913, and the authority exercised thereunder, upon the ground that the same, all and singular, is and was repugnant to and in contravention of Section 1 of Amendment 14 to the Constitution of the United States of America, in that the same, all and singular, did and does deprive plaintiff in error of its property without due process of law, and did and does deny to plaintiff in error the equal protection of the law by imposing absolute, unlimited liability upon it as an employer for personal injury sustained by its employees while in its employ without regard to and in the absence of any negligence or neglect of duty, and in the absence of any want of care or default whatsoever upon the part of plaintiff in error.

## V.

That the foregoing questions, matters and things were all and singular duly and fully and properly presented and submitted to the Supreme Court of the State of Arizona, and that as aforesaid the said last mentioned court did render and enter its judgment  
265 and decision therein and upon the same, all and singular, and that the said judgment and decision is and was in favor of the validity of said Chapter 6 of Title XIV of the Revised Statutes of Arizona, 1913, and in favor of the validity of the authority exercised thereunder, and it was the decision and judgment of said last mentioned Court that said Chapter 6 of Title XIV of the Revised Statutes of Arizona, 1913, and the authority exercised thereunder was and is, all and singular, not repugnant to or in contravention of Section 1 of Amendment 14 to the Constitution of the United States of America.

## VI.

That the Supreme Court of the State of Arizona is and was the highest court of the State of Arizona in which a decision could be had in this cause and upon the foregoing questions, matters and things, all and singular.

That the said decision and judgment aforementioned of the Supreme Court of the State of Arizona in this cause is manifestly error, and that the plaintiff in error considers itself  
266 aggrieved by the said final decision of the Supreme Court of the State of Arizona in rendering its judgment and decision against plaintiff in error in said cause.

Wherefore petitioner prays that a writ of error be allowed, and that a transcript of record, proceedings and papers upon which the

decision and judgment in this cause was rendered, duly authenticated, be ordered sent to the Supreme Court of the United States of America, at Washington, D. C., under the rules or such Court in such cases made and provided, in order that the same may, by the said Supreme Court of the United States of America, be inspected and corrected in accordance with law and justice.

(Signed)

(Signed)

CLEON T. KNAPP,  
BOYLE & PICKETT,  
*Attorneys for Petitioner.*

Endorsement: Filed Nov. 19, 1917. C. F. Leonard, Clerk Supreme Court.

## VII.

267

(Title of Court and Cause.)

### *Order Allowing Writ of Error.*

On this 19th day of November, 1917, the application of the Superior & Pittsburg Copper Company, a corporation, plaintiff in this cause, for a writ of error came on to be heard, said plaintiff in error being represented by counsel, and it appearing to the Court, from the petition filed herein and from the record and proceedings in this cause in this court filed, that its application should be granted, and that a transcript of the record, proceedings and papers upon which the judgment of the court was rendered, properly certified, should be sent to the Supreme Court of the United States of America, as prayed, in order that such proceedings may be had as may be just.

Now, therefore, it is ordered that the writ of error be allowed upon bond being furnished by the plaintiff in error, conditioned according to law, in the sum of twelve thousand dollars, and that said bond, when approved, shall operate as a supersedeas; and that a true copy of the record, assignment of errors and all proceedings in the case in

268 in the Supreme Court of the State of Arizona shall be transmitted to the Supreme Court of the United States of America, duly certified according to law, in order that said Court may inspect the same and take such action thereon as it deems proper according to law.

In witness whereof I have hereunto set my hand, at Phoenix, Arizona, on this the 19th day of November, 1917.

ALFRED FRANKLIN,  
*Chief Justice of the Supreme Court  
of the State of Arizona.*

UNITED STATES OF AMERICA,  
*District of Arizona, ss:*

I, Mose Drachman, Clerk of the United States District Court for the District of Arizona, do hereby certify the above and foregoing to



be a true and correct copy of the original order signed by Alfred Franklin, Chief Justice of the Supreme Court of the State of Arizona, allowing the issuance of a Writ of Error in the case of Superior & Pittsburg Copper Company, a corporation, Plaintiff in Error, vs. Frank Tomich, sometimes known as Frank Thomas, Defendant in Error, No. 1535 in the said Supreme Court of the State of Arizona, as the same appears from the original order on file in the Clerk's office at Tucson.

Witness my hand and the seal of said Court affixed hereto at Tucson, Arizona, this 20th day of November, A. D., 1917.

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(Signed)

MOSE DRACHMAN, *Clerk*,  
By EFFIE D. BOTTS,  
*Deputy Clerk*.

Endorsement: Filed November 21, 1917. C. F. Leonard, Clerk Supreme Court.

Supreme Court of the United States.

No. —.

SUPERIOR & PITTSBURG COPPER COMPANY, a Corporation, Plaintiff in Error,

VS.

FRANK TOMICH, Sometimes Known as Frank Thomas, Defendant in Error.

*Bond.*

Know all men by these presents:

That we, Superior & Pittsburg Copper Company, as principal, and M. J. Cunningham and L. C. Shattuck, as sureties, are held and firmly bound unto the said Frank Tomich, in the sum of Twelve Thousand (\$12,000.00) Dollars, to be paid to the said Frank Tomich, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, administrators and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this Sixteenth day of November, A. D. 1917.

Whereas, the above named plaintiff in error seeks to prosecute its writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above entitled action by the Supreme Court of the State of Arizona.

Now, therefore, the condition of this obligation is such, that if the above named plaintiff in error shall prosecute its said writ of error to effect and answer all costs and damages that may be ad-



judged if it shall fail to make good its plea, then this obligation to be void, otherwise to remain in full force and effect.

SUPERIOR & PITTSBURG COPPER  
COMPANY,

(Signed) By A. W. ENGLDER, *Chief Clerk.*  
M. J. CUNNINGHAM.  
L. C. SHATTUCK.

STATE OF ARIZONA,

*County of Cochise, ss:*

M. J. Cunningham and L. C. Shattuck being each duly sworn, on oath depose and say: We are each of lawful age and are citizens of the State of Arizona, and know the contents of the foregoing instrument to which we have attached our names. We each for himself say we are worth the sum of Twelve Thousand (\$12,000.00) Dollars, over and above all debts, liabilities and exemptions.

(Signed) M. J. CUNNINGHAM.  
L. C. SHATTUCK.

Subscribed and sworn to before me this 16th day of November, A. D. 1917.

[NOTARY SEAL.]

(Signed) CHARLES R. WOODS,  
*Notary Public, Cochise County, Arizona.*

My Commission Expires May 23rd, 1921 (1921). C. R. W.

The above bond is approved:

(Signed) ALFRED FRANKLIN,  
*Chief Justice of the State of Arizona.*

Endorsement: Filed Nov. 21, 1917. C. F. Leonard, Clerk Supreme Court.

271

*Assignment of Errors.*

(Title of Court and Cause.)

Comes now the plaintiff in error in the above entitled cause, being the defendant and appellant in the above entitled court, and files herewith its following assignments of errors, upon which it will rely upon its prosecution of the writ of error in the above entitled cause from the judgment and decision made by the Honorable Supreme Court of the State of Arizona in this said cause.

I.

The Supreme Court of the State of Arizona erred in holding that the complaint of plaintiff and defendant in error stated a cause

of action against defendant and plaintiff in error, and in holding that the demur-er of defendant and plaintiff in error to said complaint of plaintiff and defendant in error should have been overruled for the reasons as follows, to-wit:

That the complaint showed upon its face that plaintiff and  
 272 defendant in error sought to recover judgment against the defendant and plaintiff in error under and by virtue of Chapter 6 of Title XIV of the Revised Statutes of Arizona, 1913, known as "The Employers' Liability Law," and Section 7 Article 18 of the Constitution of the State of Arizona; that the aforementioned statutory enactments and said Section 7 of Article 18 of the Constitution of the State of Arizona are both null and void, for the reason that they are repugnant to, in contravention of and in violation of Section 1 of Amendment 14 to the Constitution of the United States of America, in that said Chapter 6 of Title XIV of the Revised Statutes of Arizona, 1913, and Section 7 of Article 18 of the Constitution of the State of Arizona, attempt to deprive the defendant and plaintiff in error of its property without due process of law, and deny to it the equal protection of the law by imposing absolute, unlimited liability upon defendant and plaintiff in error, as an employer, for personal injuries sustained by employees while in  
 273 its employ, in cases where defendant and plaintiff in error has been guilty of no fault, want of care or neglect of duty toward such employees; and therefore the complaint of plaintiff and defendant in error did not, and does not, state facts sufficient to constitute a cause of action against defendant and plaintiff in error, and the demurrer of said defendant and plaintiff in error should have been sustained and the Supreme Court of the State of Arizona should have so held.

## II.

In like manner the trial court, being the superior Court in and for the County of Cochise, in the State of Arizona, erred in holding that the complaint of plaintiff and defendant in error stated facts sufficient to constitute a cause of action against defendant and plaintiff in error, and in overruling the demurrer of defendant and plaintiff in error to said complaint of plaintiff and defendant in error, for the same reasons.

## III.

The Supreme Court of the State of Arizona erred in hold-  
 274 ing that Chapter 6 of Title XIV, Revised Statutes of Arizona, 1913, known as "The Employers' Liability Law," and the provisions thereof, were valid and constitutional and not repugnant to, in contravention of and in violation of Section 1 of Amendment 14 to the Constitution of the United States of America, for the reason that said Employers' Liability Law attempts to and does deprive the defendant and plaintiff in error of its property without due process of law, and denies to it the equal protection of the law, by imposing absolute, unlimited liability arbitrarily upon it, as an employer.

personal injuries sustained by employees while in its employ in cases where defendant and plaintiff in error has been guilty of no fault, want of care or neglect of duty whatsoever.

## IV.

The Supreme Court of the State of Arizona erred in holding that the trial court, being the Superior Court in and for the County of Cochise, in the State of Arizona, should not have instructed the jury to return a verdict in favor of the defendant and plaintiff in error, upon motion made by said defendant and plaintiff in error, when the plaintiff and defendant in error had rested his case in said trial court, for the reasons as follows, to-wit:

That the complaint of plaintiff and defendant in error showed upon its fact that it was an action brought under the provisions of Chapter 6 of Title XIV of the Revised Statutes of Arizona, 1913, and Section 7 of Article 18 of the Constitution of the State of Arizona; that said complaint did not allege any want of care or neglect of duty whatsoever upon the part of defendant and plaintiff in error by reason of which the injury complained of occurred, but sought to recover for such injury in the utter absence of any such fault, want of care or neglect of duty under the aforementioned provisions, which, all and singular, are null and void, being repugnant to and in contravention of Section 1 of Amendment 14 to the Constitution of the United States of America, in that the same, all and singular,

deprive defendant and plaintiff in error of its property without due process of law and deny to it the equal protection of the laws by imposing upon it, as an employer, absolute, unlimited liability arbitrarily for personal injuries sustained by its employees while in its employ in cases where defendant and plaintiff in error has been guilty of no fault, want of care or neglect of duty whatsoever, and therefore plaintiff and defendant in error had not made out any case at all against defendant and plaintiff in error upon which any liability could be based or predicated.

## V.

The trial Court, being the Superior Court in and for the County of Cochise, in the State of Arizona, erred in denying and overruling the motion made by defendant and plaintiff in error when the plaintiff and defendant in error had rested his case, and instructed the jury to return a verdict in favor of the defendant and plaintiff in error for the same reasons.

## VI.

The Supreme Court of the State of Arizona erred in holding that the following instructions, asked by the defendant and plaintiff in error of the trial court, should not have been given, to-wit:

"You are instructed that unless you find from the evidence that negligence on the part of the defendant in this case was the cause of the injury sustained by the plaintiff, then you must find

for the defendant, for the reason that there can be no liability without fault in such a case as this," for the reason that no arbitrary, unlimited liability can be imposed in the absence of fault, want of care or neglect of some duty, and the complaint of plaintiff and defendant in error sought to recover such, based upon the provisions of Chapter 6 of Title XIV of the Revised Statutes of Arizona, 1913, which imposed such liability and the instruction requested, above set out, should have been given.

#### VII.

The trial court, being the Superior Court in and for the County of Cochise, in the State of Arizona, erred in refusing the following instruction asked by the defendant: "You are instructed that unless you find from the evidence that negligence on the part of the defendant in this case was the cause of the injury sustained by  
277 the plaintiff, then you must find for the defendant, for the reason that there can be no liability without fault in such a case as this," for the same reasons.

#### VIII.

The Supreme Court of the State of Arizona erred in holding that the trial court, being the Superior Court in and for the County of Cochise, in the State of Arizona, in instructing the jury, properly read to the jury the provisions of Chapter 6 of Title XIV of the Revised Statutes of Arizona, 1913, for the reason that said enactment was not and is not properly a law of this case, for the reason that the same is null and void, and is repugnant to and in contravention of Section 1 of Amendment 14 to the Constitution of the United States of America, in the particulars and for the matters set out in the foregoing assignment of error No. 1, which is hereby referred to to avoid repetition.

#### IX.

The trial court, being the Superior Court in and for the County of Cochise, in the State of Arizona, erred in reading to the jury in instructing the jury the provisions of Chapter 6 of Title  
278 XIV of the Revised Statutes of Arizona, 1913, for the same reasons.

#### X.

The Supreme Court of Arizona erred in affirming the judgment of the trial court, being the Superior Court in and for the County of Cochise, in the State of Arizona, by reason of the matters and things, all and singular, hereinbefore set out in the foregoing assignments of error.

## XI.

The trial court, being the Superior Court in and for the County of Cochise, in the State of Arizona, erred in refusing to set aside the verdict and the judgment in this cause, and to grant to defendant and plaintiff in error a new trial in said cause, by reason of the matters and things, ail and singular, set out in the foregoing assignments of error and contained in the motion for new trial in this cause in said Court, and which appears in the record in this cause.

## XII.

The Supreme Court of the State of Arizona erred in denying and overruling the motion for re-hearing of defendant and plaintiff in error in this cause filed in said Court, because of the matters and things, all and singular, set out in the foregoing assignments, of error and contained in said motion for re-hearing, which appears in the record in this cause and to which reference is hereby made for the sake of brevity and to avoid repetition of said matters and things contained in said foregoing assignments of error.

Wherefore, plaintiff in error prays that the said judgment and decision of the Supreme Court of the State of Arizona be reversed, and that said Supreme Court of the State of Arizona, be ordered to enter its judgment reversing the decision and judgment of the trial court, being the Superior Court in and for the County of Cochise, in the State of Arizona, in this cause, and that judgment be rendered in said cause in favor of the plaintiff in error herein and against the defendant in error herein.

(Signed)

CLEON T. KNAPP,  
BOYLE & PICKETT,  
*Attorneys for Plaintiff in Error.*

Endorsement: Filed November 19, 1917. C. F. Leonard, Clerk Supreme Court.

280

*Præcipe.*

(Title of Court and Cause.)

To the Honorable C. F. Leonard, Clerk of the Supreme Court of the State of Arizona:

You are hereby directed to prepare, according to the law in such cases made and provided, and the proper orders of this court, a transcript of the record and proceedings in the above entitled cause in the above entitled Court for transmission, in due course, to the Supreme Court of the United States of America, pursuant to the writ of error in said cause duly allowed heretofore, all properly

certified and including the following matters and things, all and singular, to-wit:

1. Plaintiff's complaint.
2. Defendant's fourth amended answer.
3. Instructions requested by defendant.
4. Instructions given by the trial court.
5. The verdict returned by the jury.
6. The judgment rendered and entered in and by the trial court.
7. The minute entries of the trial court, all and singular.
8. Defendant's motion for new trial.
9. Notice of appeal by defendant.
10. Supersedeas bond on appeal.
- 281 11. Notice of filing of transcript with clerk of trial court.
12. Stipulation for a certification of transcript.
13. The testimony of the following named witness-s in the trial court, to-wit:  
Garfield Anjov.  
Chas. F. Hawley.  
H. H. Hugart.  
Ed Massey.  
Wm. McDonald.  
Thomas A. Murphy.  
Frank Tomich.  
Katie Tomich.
14. Affidavits of Hubert H. d'Autremont and H. E. Pickett in support of motion for new trial.
15. The opinion and decision of the Supreme Court of Arizona in this cause, and the mandate of this court herein issued.
16. The dissenting opinion of Mr. Justice Ross in the Supreme Court of the State of Arizona in this cause.
17. Each and all of the orders and minute entries made and entered in the Supreme Court of the State of Arizona in this cause.
18. The motion for re-hearing filed by appellant in this cause.
19. The order of the Supreme Court of Arizona denying said motion for re-hearing in this cause.
20. Petition for writ of error in this cause to the Supreme Court of the United States of America.
21. The order allowing said writ of error, with order for supersedeas bond in this cause.
22. The bond on said writ of error in this cause.
- 282 23. The assignment of errors, with prayer for reversal in this cause.
24. The original writ of error in this cause.
25. The citation upon the writ of error in this cause.
26. This præcipe.

Respectfully,

(Signed)

CLEON T. KNAPP,  
BOYLE & PICKETT,  
*Attorneys for Plaintiff in Error.*

Endorsement: Filed November 21, 1917. C. F. Leonard, Clerk  
Supreme Court.

283 In the Supreme Court of the State of Arizona.

*Clerk's Certificate.*

SUPREME COURT,  
*State of Arizona, ss:*

I, C. F. Leonard, Clerk of the Supreme Court of the State of Arizona, do hereby certify that the foregoing pages, numbered from 1 to 282, inclusive, contain a full, true and complete transcript of the Plaintiff's Complaint, Defendant's Fourth Amended answer, Instructions requested by defendant, Instructions given by the trial Court, the Verdict of the Jury, the Judgment rendered by the trial court, Minute entries of the trial court, Defendant's Motion for new trial, Notice of Appeal by defendant, Supersedeas Bond on appeal, Notice of filing transcript with Clerk of trial court, Stipulation for a certification of transcript, The testimony of Garfield Anjov, Chas. F. Hawley, H. H. Hugart, Ed. Massey, Wm. McDonald, Thomas A. Murphy, Frank Tomich and Katie Tomich; Affidavits of H. d'Au-

284 tremont and H. E. Pickett in support of motion for new trial, Opinion and decision of the Supreme Court of Arizona in this cause, and Mandate issued; Dissenting opinion of Mr. Justice Ross; all Orders and Minute entries, Motion for re-hearing by appellant, Order denying motion for re-hearing, Petition for writ of error to the Supreme Court of the United States, Order allowing writ of error, Supersedeas bond on writ of error, Assignments of error and prayer for reversal and præcipe, in Cause No. 1535, wherein Superior & Pittsburg Copper Company, a corporation is Appellant, and Frank Tomich, sometimes known as Frank Thomas, is Apellee; as the same remain on file and of record in my office; being all that portion of the original record indicated by the Appellant herein by its præcipe filed in said cause, as necessary to the consideration of the questions to be reviewed on Writ of Error to the Supreme Court of the United States.

And I further certify that the Writ of Error and Citation, showing service thereon and hereto attached, is the original Writ of Error and Citation issued by the said Supreme Court of the State of Arizona in the above entitled cause.

285 In witness whereof, I have hereunto set my hand and affixed the seal of the Supreme Court of the State of Arizona, at the City of Phoenix this 20th day of December, A. D., 1917.

[Seal Supreme Court, State of Arizona.]

C. F. LEONARD,  
*Clerk of the Supreme Court of the State of Arizona.*



286 In the Supreme Court of the United States of America.

SUPERIOR & PITTSBURG COPPER COMPANY, a Corporation, Plaintiff  
in Error,

VS.

FRANK TOMICH, Sometimes Known as FRANK THOMAS, Defendant  
in Error.

*Writ of Error.*

UNITED STATES OF AMERICA, ss:

The President of the United States. to the Honorable Justices of the  
Supreme Court of the State of Arizona, Greeting:

Whereas, in the record and proceeding and in the rendition of  
the judgment of the above entitled cause, which is now before you,  
or some of you, between Frank Tomich, sometimes known as Frank  
Thomas, plaintiff and appellee, and The Superior & Pittsburg Copper  
Company, a corporation, defendant and appellant, your Court being  
the highest court of said State having jurisdiction of the cause, there  
was drawn in question the validity of Chapter 6 of Title XIV of the  
Revised Statutes of Arizona, 1913, and the provisions thereof, and  
the authority exercised thereunder, all and singular, upon the ground  
that the same, all and singular, is and was repugnant to and in  
contravention of Section 1 of Amendment 14 to the Constitution  
of the United States of America, and the decision of your court was  
in favor of the validity of said Chapter 6 of Title XIV of the Revised  
Statutes of Arizona, 1913, and of the provisions thereof, and the au-  
thority exercised thereunder, all and singular; and, whereas, there  
is manifest error in said decision, to the damage of said The

287 Superior & Pittsburg Copper Company, a corporation, the peti-  
tioner in error; and, whereas, we are willing that if there is  
error it should be duly corrected, we command you therefore if judg-  
ment be therein given, that then, under your seal, distinctly and  
openly you send the record and proceedings in said cause with all  
things concerning the same, to the Supreme Court of The United  
States of America, together with this writ, so that you have the same  
in the said Supreme Court, at Washington, D. C., within sixty days  
from the date hereof, that the record and proceedings in said cause  
being inspected, the said Supreme Court of the United States of Amer-  
ica may cause further to be done therein to correct that error, what of  
right and according to the laws and customs of the United States of  
America should be done.



Witness the Honorable Edward Douglass White, Chief Justice of the Supreme Court of the United States this 20th day of November, 1917.

[Seal United States District Court, District of Arizona.]

MOSES DRACHMAN,  
*Clerk of the United States District Court  
for the District of Arizona.*

Allowed on this 21st day of November, 1917, by  
ALFRED FRANKLIN,  
*Chief Justice of the Supreme Court of the State of Arizona.*

288 Service of the within Writ of Error is hereby acknowledged this 20th day of Nov. 1917.

FRED SUTTER,  
*Of Bisbee, Arizona;*  
J. T. KINGSBURY,  
*Of Tombstone, Arizona,*  
*Attorneys for Defendant in Error.*

[Endorsed:] In the Supreme Court of the United States of America. Superior & Pittsburg Copper Company, a corporation, Plaintiff in Error, vs. Frank Tomich, sometimes known as Frank Thomas, Defendant in Error. Writ of Error. Filed Nov. 21, 1917. C. F. Leonard, Clerk Supreme Court. Cleon T. Knapp, of Bisbee, Ariz., Messrs. Boyle & Pickett, of Douglas, Arizona, Attorneys for Plaintiff in Error.

289 In the Supreme Court of the United States of America.

SUPERIOR & PITTSBURG COPPER COMPANY, a Corporation, Plaintiff  
in Error,

vs.

FRANK TOMICH, Sometimes Known as FRANK THOMAS, Defendant  
in Error.

*Citation.*

UNITED STATES OF AMERICA, ss:

The President of the United States to the Honorable Justices of the Supreme Court of the State of Arizona, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States of America, at Washington, D. C., within sixty days from the date hereof, pursuant to a writ of error filed in the office of the Clerk of the Supreme Court of the State of Arizona, wherein the Superior & Pittsburg Copper Company, a corporation, is plaintiff in error and you are defendant in

error, to show cause, if any there be, why the judgment and decision rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Chief Justice of the Supreme Court of the State of Arizona, this 21st day of November, 1917.

ALFRED FRANKLIN,  
*Chief Justice of the Supreme  
Court of the State of Arizona.*

290 Attest:

[Seal Supreme Court, State of Arizona.]

C. F. LEONARD,  
*Clerk of the Supreme Court of the  
State of Arizona.*

Bisbee, Arizona, November 21st, 1917.

We, the attorneys of record for the defendant in error in the above entitled cause, hereby acknowledge due service of the above and foregoing citation, and we do hereby enter an appearance in the Supreme Court of the United States of America.

FRED SUTTER,  
J. T. KINGSBURY,  
*Attorneys for Frank Tomich, Sometimes Known  
as Frank Thomas, the Defendant in Error.*

291 Service of the within citation is hereby acknowledged this 21st day of November, 1917.

FRED SUTTER,  
*Of Bisbee, Arizona;*  
J. T. KINGSBURY,  
*Of Tombstone, Arizona,*  
*Attorneys for Defendant in Error.*

[Endorsed:] In the Supreme Court of the United States of America. Superior & Pittsburg Copper Company, a corporation, Plaintiff in Error, vs. Frank Tomich, sometimes known as Frank Thomas, Defendant in Error. Citation. Filed Nov. 21, 1917. C. F. Leonard, Clerk Supreme Court. Cleon T. Knapp, of Bisbee, Arizona, Messrs. Boyle & Pickett, of Douglas, Arizona, Attorneys for Plaintiff in Error.

Endorsed on cover: File No. 26,289. Arizona Supreme Court. Term No. 822. The Superior & Pittsburg Copper Company, plaintiff in error, vs. Frank Tomich, sometimes known as Frank Thomas. Filed January 22d, 1918. File No. 26,289.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1917

No. 822.

SUPERIOR & PITTSBURG  
COPPER COMPANY, a  
corporation,

*Plaintiff in Error.*

*vs.*

FRANK TOMICH, sometimes  
known as Frank Thomas,

*Defendant in Error.*

**Brief for  
Plaintiff  
in Error**

## STATEMENT.

This case comes before this Court upon the question of the validity of the Arizona Employers' Liability Law, (Chapter 6, Title 14, Revised Statutes of Arizona, 1913. See Appendix "A"). The same question has been presented to this Court in the following cases, and is now under consideration:

*Arizona Copper Company, Limited vs.  
Joseph B. Hammer. No. 161. Ari-*

*zona Copper Company, Limited, vs. Richard Bray.* No. 162; both argued and submitted January 26th, 1918;

*Ray Consolidated Copper Company vs. Dan Veazey.* No. 603; argued and submitted January 28th, 1918;

Also

*Inspiration Consolidated Copper Company vs. Mendez.* No. 819;

*Superior & Pittsburg Copper Company vs. Steve Davidovich,* sometimes known as Steve Davis. No. 592, October 1918 Term, and this case, No. 822.

Counsel in presenting this brief is assuming that the question raised as to the constitutionality of the Arizona Employers' Liability Law will be determined by this Court before consideration of the herein case, or the consideration of this brief. However, a statement of the case can be made, though nothing new may be added to briefs submitted in the cases just before named.

This action was brought by Frank Tomich for \$15,000.00 damages for personal injuries, resulting in the loss of the tips of the fore, middle and ring fingers of the right hand; amputation being made between the first joint and the finger nails. The accident occurred when Tomich released the door and pushed his ore car into the dump board with such force that the momentum carried the car forward, wheels up, and the back end hit the protecting bar,

catching Tomich's fingers, while he still held involuntarily to the car.

The complaint alleged two causes of action; one under the Arizona Employers' Liability Law; and one under the common law, which charged plaintiff in error with negligence (Record, pp. 1-5). Later the common law cause was dismissed (Record, p. 97) and the case was tried under the Employers' Liability Law, after demurrer to same had been overruled (Record, p. 97). The question of negligence of plaintiff in error was not an issue. The jury returned a verdict for \$8000.00 for Tomich.

#### *ASSIGNMENT OF ERROR AND QUESTION PRESENTED .*

The question presented then is the same as in the cases before named, to-wit: Is the said Arizona Employers' Liability Law unconstitutional in that its provisions deprive the plaintiff in error of its property, without due process of law, and denies to it the equal protection of the law by subjecting it to unlimited liability for damages for personal injuries suffered by its employees without any fault or negligence on the part of plaintiff in error causing or contributing thereto; in contravention to the Fourteenth Amendment to the Constitution of the United States.

## POINTS

## AS EXERCISE OF POLICE POWER

Under the laws of Arizona Tomich had the legal right to pursue one of three remedies after injury:

1. The Common Law, relieved of the fellow-servant defence.
2. The Employers' Liability Law, applying to hazardous occupations when the injury or death is not caused by employee's negligence.
3. Compulsory Compensation Law applying to dangerous occupations.

*Consolidated Arizona Smelting Company vs. Ujack*, 15 Ariz. 382; 139 Pac. 465.

Tomich having proceeded under the Employers' Liability Law, was not required to, and did not show negligence or fault upon the part of the plaintiff in error. In fact, the plaintiff in error was even precluded from showing that it was not guilty of any negligence or fault, as that question under that peculiar law, was not an issue in the case. The law imposes an unlimited liability on the employer irrespective of fault or negligence.

*Inspiration Consolidated Copper Company vs. Mendez*, 166 Pac. 278; ~~166 Pac. 278~~; 19 Ariz. ....;

*Superior & Pittsburg Copper Company vs. Tomich*, 165 Pac. 1101; 19 Ariz. ....



If there is any justification for the enactment of such a law it must be found in the exercise of police power. This Court in passing upon the exercise of police power has repeatedly recognized the difficulty of applying any exact definition of that power. It is generally recognized as the right of a state to legislate for its general welfare and betterment. The extent to which the power may be exercised is dependent largely upon industrial and social conditions and to promote generally the health, safety and general welfare of the people. The line of demarcation is not always easy to distinguish or define. Each exercise must be measured of itself.

*Noble State Bank vs. Haskell*, 219 U. S. 104; 55 L. ed. 112;

*Camfield vs. United States*, 167 U. S. 518; 42 L. ed. 260.

It is, however, recognized that the police power can not be used in an arbitrary manner, and calculated to deprive one of private rights. So while that power "extends to all great public needs" those same public needs place a limitation upon its valid exercise. The rule of reason must be applied in all such exercises. Its exercises are various and based upon sound public policy and needs.

*Hurtado vs. California*, 110 U. S. 516; 28 L. ed. 232;

*Hayes vs. Missouri*, 120 U. S. 68; 30 L. ed. 578;

*Missouri P. Ry. Co. vs. Mackey*, 127 U. S. 205; 32 L. ed. 107;

*Hallinger vs. Davis*, 146 U. S. 314; 36 L. ed. 986;

*Holden vs. Hardy*, 169 U. S. 366; 42 L. ed. 780;

*Barbier vs. Connolly*, 113 U. S. 27; 28 L. ed. 923.

This Court has recognized that the police power cannot be used as an exercise for unjust and oppressive legislation.

*Davidson vs. New Orleans*, 96 U. S. 97; 24 L. ed. 616;

*Yick Wo vs. Hopkins*, 118 U. S. 356; 30 L. ed. 220.

The question presented then is whether the enactment of a law under the police power by a state is calculated to benefit the public needs. Whether such power is exercised to promote the health, safety and general welfare of the people. And the test to be applied is not the mere wording of the purpose, but whether in practice it would actually accomplish an object beneficial to the health, safety and general welfare.

“The mere assertion that the subject relates, though but in a remote degree to public health, does not necessarily render the enactment valid. The act must have a more direct relation, as a means to an end, and the end itself must be appropriate and legitimate, before an act can be held to be valid, which interferes with the general right of an individual to be free in

his person, and in his power to contract in relation to his own labor."

*Lockner vs. New York*, 198 U. S. 45; 49 L. ed. 937.

## ARIZONA LAW NOT VALID EXERCISE OF POLICE POWER

We contend that the Arizona Employers' Liability Law is in no way designed to benefit either the health, safety or general welfare. It certainly is not designed to benefit the health or safety, as nowhere in the law or in the Arizona Constitution (Sec. 7, Art. 18) directing its enactment does there appear any provision designed to benefit the health or safety of employees of the stated occupations. It is true that the Arizona Constitution (Sec. 7, Art. 18) provides that "to protect the safety of employees \* \* \* the Legislature shall enact an Employers' Liability Law," and it is true that Section 3157 of said law provides that employers shall, by rules, inform employees "as to the duties and restrictions of their employment." The law then proceeds to abrogate the common law rule of liability, by imposing unlimited liability upon employers, regardless of fault or negligence, but it is difficult to see in what manner such abrogation promotes or benefits the safety or health of the employees. We believe it quite obvious that no serious claim could be made that such law benefits either the health or safety of employees, re-

gardless of words intended to give such effect. Mere words alone are not sufficient. As to whether health or safety is benefited is measured by actual results that may reasonably be expected to follow from the enactment of a law. The law places no duty for the violation of which a penalty is imposed.

Can the law be said to be beneficial to public welfare. We admit that if it were designed to benefit the health and safety of employees it would be beneficial to public welfare. But it is not. We admit that if it removes existing ills in present social, industrial, or economic conditions in Arizona, it might, under certain circumstances, be beneficial to public welfare. But it does not. It adds to existing ills.

### DO REASONS SUPPORTING WORK- MAN'S COMPENSATION ACTS LE- GALLY JUSTIFY ARIZONA EM- PLOYERS' LIABILITY LAW

We submit that if any justification can be found for the legality of Arizona Employers' Liability Law, it must be upon reasons supporting the legality of Compulsory Compensation Acts. And it is solely upon such grounds that the Arizona Supreme Court attempted to find justification for its legality.

*Inspiration Consolidated Copper Com-  
pany vs. Mendez*, 166 Pac. 278; 19  
Ariz. ....;

*Superior & Pittsburg Copper Company  
vs. Tomich*, 165 Pac. 1101; 19 Ariz.

We assume that the decisions of this Court in the following cases cover the field of justification for enactment of Compensation Laws. And if there is justification for the legality of the Arizona Employers' Liability Law, it must be found in the reasons therein given:

*New York Cen. R. R. Co. vs. White*, 243 U. S. 188;

*Hawkins vs. Bleakely*, 243 U. S. 210;

*Mountain Timber Co. vs. Washington*, 243 U. S. 219.

The decisions in those cases are influenced by the consideration that the legislature in the enactment of those laws, substituted a substantial equivalent. Justice Pitney in the *White* case said that certain common law defenses could be completely abolished without violating any fundamental right of the employer or the law of the land, and cites a number of cases supporting that view, but adds "there were reasons rendering the particular departure appropriate," and "Nor is it necessary \* \* \* to say that a state might, without violence to the constitutional guaranty of 'due process of law' suddenly set aside all common law rules respecting liability as between employer and employee, without providing a *reasonably just substitute*," and "it perhaps may be doubted whether the State could abolish all rights of action, on the one hand, or

all defenses on the other, without *setting up something adequate in their stead.*" (Italics mine.) States in the valid exercise of police power have imposed liability upon employers regardless of fault or negligence. Such exercise of police power has been through the enactment of Workmen's Compulsory Compensation Acts. In all such enactments the liability imposed is not unlimited, and there has been in every such exercise a substituted equivalent in the form of a definite, reasonable and limited compensation for injury or death. If we are correct in our interpretation of the decisions of this Court interpreting such Workmen's Compulsory Compensation Acts, the abrogation of the Common Law rules of liability is only justified, and can only be supported by the fact that there was substituted a definite, reasonable and limited compensation.

Our quarrel with the Arizona Employers' Liability Law is not altogether that it abrogates the common law rules of liability as that it absolutely fails to set "up something adequate in their stead." "This Court repeatedly has upheld the authority of the states to establish by legislation departures from the fellow servant rule and other common law rules affecting the employers' liability for personal injuries to the employee." (White case.) And in the White case the Court approved the New York statute doing away with the common law

doctrine of employers' liability for negligence, but only because a reasonable, substantial remedy was substituted, consonant with a more enlightened policy in the adjustment of injury problems between employer and employee.

We submit that the Arizona Employers' Liability Law cannot be justified upon any of the grounds supporting the legality of Compensation Acts. And "we are brought to the question whether the method \* \* \* that is established as a substitute transcends the limits of permissible state action," and "whether the new arrangement is arbitrary and unreasonable from the standpoint of natural justice." (White case.) In the first place the Arizona Employers' Liability Law is not a "method of compensation." It is a suit for damages, and so expressly states. It does not relieve the employer from responsibility for damages measured by common law standards, by requiring "him to contribute a reasonable amount and according to a reasonable and definite scale, by way of compensation for loss of earning power," but on the contrary preserves all the attendant evils of the common law system, with the added burden of arbitrary liability regardless of fault. It preserves the jury system of awarding damages in an unlimited amount, not compensation, and should the employer be presumptuous enough to appeal, he is what might be

called fined, by being assessed interest on the judgment at 12 % from date thereof. It surely cannot be said to be a substituted system which makes possible *definite* or *reasonable* awards for injuries.

This Court was quick to suggest in the White case that "this of course, is not to say that any scale of compensation, however insignificant on the one hand, or onerous, on the other, would be supportable." The New York law there under consideration was not pronounced arbitrary and unreasonable, for the reason that in that law the compensation was moderate and definite. The Arizona Employers' Liability Law provides for unlimited *damages*. No element of *compensation* enters into that law. If the history of litigation thus far had under it, is any criterion of the future, we can never expect awards to be *moderate*. Neither will the judgments be *definite*, in that one jury may award One thousand dollars for the loss of a finger, while another may award Eight thousand dollars.

It has been suggested in the cases now pending before this Court that in Arizona the people can be divided into two classes; the employer and the employee, with the latter class greatly predominating. There is not that great middle class found in older and more developed states, where the industries and occupations are more diversified. Hence Arizona juries are composed largely and sometimes entirely of men employed in mines or



smelters, notoriously prejudiced against employers of labor. Nine can return a verdict. Some suits have more of the nature of a criminal proceeding than that of a civil suit. And a jury is entitled, under the provisions of the law, to indulge its every whim. The New York compensation law provided for "compensation for the loss of earning power." The Arizona Employers' Liability Law provides for damages not alone for loss of earning power, but for pain, suffering, mental and physical anguish, and humiliation, and the jury is quick to consider all such elements.

See dissenting opinion Judge Ross. *Superior & Pittsburg Copper Company vs. Tomich*, 165 Pac. 1186.

We would ask that the Arizona Employers' Liability Law be borne in mind while considering the following and compare its operation and effect to the policy sought in Compensation Acts:

"In the enactment of the compensation law the legislature recognized that the common law remedies for injuries sustained in certain hazardous industries were inadequate, unscientific and unjust, and therefore a substitute was provided by which a more *equitable adjustment* of such loss could be made under a system which was intended largely to *eliminate controversies and litigation*. \* \* \*"  
(Italics mine.)

*McRoberts vs. National Zinc Company*,  
144 Pac. 247 (Kan.)

"It has endeavored by this law to provide a way by which employer and employed may, if they so choose, escape entirely from that very troublesome and economically absurd luxury known as 'Personal Injury Litigation,' and resort to a system \* \* \* *without a law suit and without friction.*" (Italics mine.)

*Borgnis vs. Falk Co.*, 133 N. W. 209; 37 L. R. A. (NS) 489, at page 493; 147 Wis. 327.

"The principal objects to be attained in a workman's compensation act are: 1. To furnish *certain, prompt and reasonable compensation* to the injured employee." (Italics mine.)

Legislative Commission of Wisconsin.

"The administration of justice today is clogged in every court, by the great number of suits for *damages for personal injuries*. The settlement of such cases by this system will serve to reduce the burden of our courts one-half by taking the cases out of court and disposing of them by this short cut." (Italics mine.)

President Taft in his message to Congress, submitted the Federal Act, 1912.

"It (the Washington Act) is founded on the basic principle that certain defined industries called in the Act, Extra Hazardous, should be made to bear the financial losses, sustained by the workmen engaged therein, through personal injuries, and its purpose is to furnish a remedy that will reach every injury sustained by

a workman engaged in any such industries, and make a *sure and certain award* therefor, bearing a *just proportion to the loss sustained*, regardless of the manner in which the injury was received." (Italics mine.)

*State ex Rel Davis-Smith Company vs. Clausen*, 65 Wash. 156; 117 Pac. 1101, page 1114.

The report of the Federal Commission recommending to the President and Congress, the Federal Workman's Compulsory Compensation Law, said:

"It may well be argued that legislation which puts upon the employer this naked burden, irrespective of fault, without the compensating circumstances of being relieved in any other direction, is so *arbitrary and unreasonable* as to fall within the inhibition of the fifth amendment against the deprivation of property without due process of law." (Italics mine.)

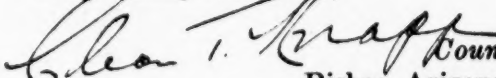
Page 63, Report.

Can it be said that the Employers' Liability Law was aimed to remedy the evils above set forth? Does it give to the employer any benefit in return for additional burdens?

In conclusion. No evil attendant upon the old personal injury litigation has been removed by the Arizona Employers' Liability Law. The law's delay, the court expense, the large attorney fee, the oftentimes miscarriage of justice by inadequate verdicts, and more often by excessive verdicts, the bitterness growing

from litigation; all these and many more are still attendant upon the trail of this law. Every reason prompting the enactment of compensation laws is lacking to support this law. It is not designed in the remotest way to protect health, safety or public welfare. It is not a valid exercise of police power. The Arizona Supreme Court vainly searched for authorities to justify the constitutionality of the law, and was forced to base its decision entirely upon the reasons given in the White case upholding the New York Compensation Law. If Arizona can legally adopt such a law, every state can do so, and litigation would become so much more inviting than under the now difficult common law practice, that Compensation Laws would in many states become obsolete or practically inoperative. Personal injury litigation would be reborn. The law should be held void.

Respectfully submitted,

 Counsel.  
Bisbee, Arizona,

## APPENDIX A

### I. CONSTITUTION OF ARIZONA.

Article XVIII of the Arizona Constitution is entitled "Labor." Sections 4, 5, 6, 7 and 8 of that Article are as follows:

"Sec. 4. The common law doctrine of fellow servant, so far as it affects the lia-

bility of a master for injuries to his servant resulting from the acts or omissions of any other servant or servants of the common master is forever abrogated.

"Sec. 5. The defense of contributory negligence or of assumption of risk shall in all cases whatsoever, be questions of fact and shall, at all times, be left to the jury.

"Sec. 6. The right of action to recover damages for injuries shall never be abrogated, and the amount recovered shall not be subject to any statutory limitation.

"Sec. 7. To protect the safety of employees in all hazardous occupations, in mining, smelting, manufacturing, railroad or street railway transportation, or in any other industry the legislature shall enact an *Employers' Liability Law*, by the terms of which any employer, whether individual, association or corporation shall be liable for the death or injury, caused by any accident due to a condition or conditions of such occupation, of any employee in the service of such employer in such hazardous occupation, in all cases in which such death or injury of such employee shall not have been caused by the negligence of the employee killed or injured.

"Sec. 8. The Legislature shall enact a *Workmen's Compulsory Compensation Law* applicable to workmen engaged in manual or mechanical labor in such employments as the Legislature may determine to be especially dangerous, by which compulsory compensation shall be re-

quired to be paid to any such workman by his employer, if in the course of such employment personal injury to any such workmen from any accident arising out of, and in the course of such employment is caused in whole or in part, or is contributed to, by a necessary risk or danger of such employment, or a necessary risk or danger inherent in the nature thereof, or by failure of such employer, or any of his or its officers, agents, or employee, or employees, to exercise due care, or to comply with any affecting such employment; Provided, that it shall be optional with said employee to settle for such compensation, or retain the right to sue said employer as provided by this Constitution."

## II. EMPLOYERS' LIABILITY LAW.

This law was enacted by the Legislature, at its first Special Session held in 1912, shortly after the adoption of the Constitution, and now comprises Chapter VI, of Title 14 of the Revised Statutes of Arizona, 1913, entitled "Liability of employers for injuries to workmen in dangerous occupations." (Sections 3153 to 3162, inclusive.)

The relevant portions of the Act are as follows:

"Sec. 3153. This chapter is and shall be declared to be an Employers' Liability law, as prescribed in Section 7 of Article XVIII of the State Constitution.

“Sec. 3154. That to protect the safety of employees in all hazardous occupations in mining, smelting, manufacturing, railroad, or street railway transportation, or any other industry, as provided in said Section 7 of Article XVIII of the state constitution, any employer, whether individual, association or corporation, shall be liable for the death or injury, caused by any accident due to a condition or conditions of such occupation, of any employee in the service of such employer in such hazardous occupation, in all cases in which such death or injury of such employee shall not have been caused by the negligence of the employee killed or injured.

“Sec. 3155. The labor and services of workmen at manual and mechanical labor, in the employment of any person, firm, association, company, or corporation, in the occupations enumerated in the next section hereof, are hereby declared and determined to be service in a hazardous occupation within the meaning of the terms of the preceding section.

“By reason of the nature and conditions of, and the means used and provided for doing the work in, said occupations, such service is especially dangerous and hazardous to the workmen therein, because of risk and hazards which are inherent in such occupations and which are unavoidable by the workmen therein.

“Sec. 3156. The occupations hereby declared and determined to be hazard-

ous within the meaning of this chapter are as follows:

“(1) The operation of steam railroads, etc.  
\* \* \* \* \*

“(8) All work in and about quarries, open pits, open cuts, mines, ore reduction works and smelters.  
\* \* \* \* \*

“(10) All work in mills, shops, works, yards, plants and factories where steam, electricity or any other mechanical power is used to operate machinery and appliances in and about such premises.

“Sec. 3157. Every employer, whether individual, firm, association, company or corporation, employing workmen in such occupation, of itself or through an agent, shall by rules, regulations and instructions inform all employees in such occupations as to the duties and restrictions of their employment, to the end of protecting the safety of employees in such employment.

“Sec. 3158. When in the course of work in any of the employments or occupations enumerated in the preceding section, personal injury or death by any accident arising out of and in the course of such labor, services and employment, and due to a condition or conditions of such occupation or employment, is caused to or suffered by any workman engaged therein, in all cases in which such injury or death of such employee shall not have been caused by the negligence of the employee killed or injured, then the em-



ployer of such employee shall be liable in damages to the employee injured, or, in case death ensues, to the personal representative of the deceased for the benefit of the surviving widow or husband and children of such employee; and, if none, then to such employee's parents and if none, then to the next of kin dependent upon such employee, and if none, then to his personal representative, for the benefit of the estate of the deceased.

"Sec. 3159. In all actions hereafter brought against any such employer under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to any employee, or where such injuries have resulted in his death, the question whether the employee may have been guilty of contributory negligence, or has assumed the risk, shall be a question of fact and shall at all times, regardless of the state of the evidence relating thereto, be left to the jury, as provided in Section 5 of Article XVIII of the state constitution; provided, however, that in all actions brought against any employer, under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee.

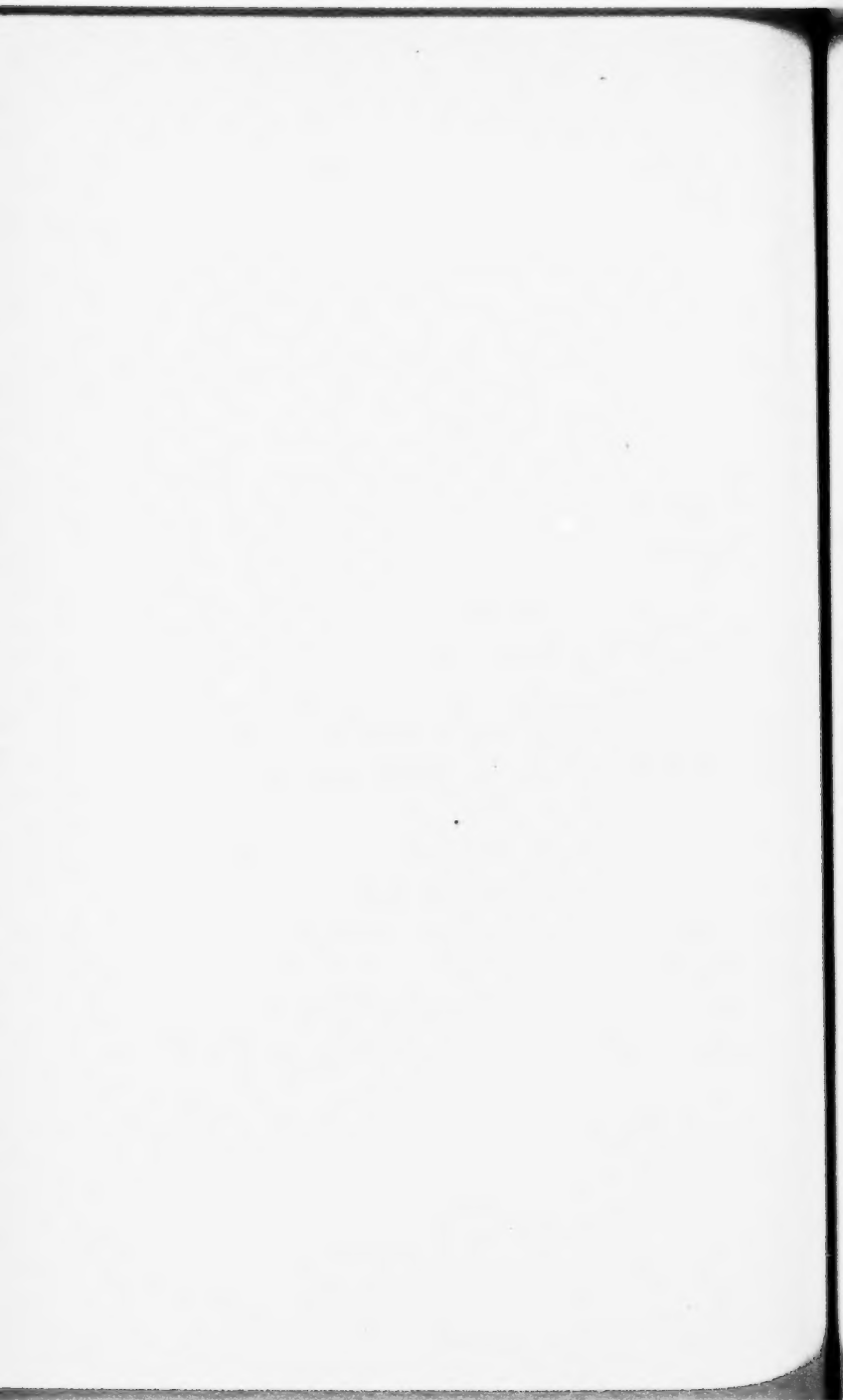
"Sec. 3161. In all actions for damages brought under the provisions of this chapter, if the plaintiff be successful in obtaining judgment, and if the defendant appeals to a higher court, and if the plaintiff in the lower court be again successful; and the judgment of the lower court is sustained by the higher court or courts; then and in that event the plaintiff shall have added to the amount of such judgment by such higher court or courts, interest at the rate of 12 percent. per annum on the amount of such judgment from the date of the filing of the suit in the first instance until the full amount of such judgment is paid."

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IN THE

# Supreme Court of the United States

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OCTOBER TERM, 1917

No. 822

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SUPERIOR & PITTSBURG COP-  
PER COMPANY, a corporation,

*Plaintiff in Error,*

*vs.*

FRANK TOMICH, sometimes  
known as FRANK THOMAS,

*Defendant in Error.*

*Brief of  
Defendant  
In Error*

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## STATEMENT

As stated in the brief of plaintiff in error, this case comes before this court upon the question of the constitutionality of the Employers' Liability Law of Arizona, (Chapter 6, Title 14, Revised Statutes of Arizona, 1913). The full text of the law is set forth in Appendix A to the brief of plaintiff in error, and it is not necessary to quote it herein.

The statement of the case in the brief of plaintiff in error fairly states the facts, except that the evidence does not show that defendant in error, "pushed his ore car into the dump-board"; but, on the contrary, the evidence tends to show that defendant in error was unable to hold the car back, owing to his having slipped on the foot-board between the car tracks.

### ARGUMENT

In the brief filed herein by plaintiff in error, counsel raises the question as to whether or not the legislature of the state of Arizona had the authority to enact legislation holding the employer liable for injuries occurring to employees without any fault or negligence on the part of the employer. That question has been finally and definitely settled by this Court in the following cases:

*Chicago R. I. & P. R. R. Co. vs. Zerneck*,  
183 U. S. 582;

*New York Cent. R. R. Co. vs. White*, 243  
U. S. 187.

*Mountain Timber Co. vs. Washington*, 243.  
U. S. 217.

When it is once admitted that a state may enact legislation holding an employer liable to an employee for injuries occurring in the course of his employment, then, so far as this case is concerned, there remains but one other question to be decided, and that is: In what manner should the amount of liability be determined?

Counsel for plaintiff in error contends that courts

have sustained Workmen's Compulsory Compensation Acts because the amount which the injured employee could recover was either fixed by the law itself or by a commission appointed for that purpose, and argues that the Arizona Employers' Liability Law should be held unconstitutional because the amount of damages recovered is left to a jury. That the Liability Law leaves the amount of damages to be recovered to be determined by a jury surely cannot be ground for holding it unconstitutional. Such a provision in the Arizona law is simply a reenactment of the common law, and does not deprive the defendant of his constitutional right of trial by jury, which has been the objection to every Compensation Law enacted in the United States where the legislature fixed the amount an employee should receive in case of injury.

*Ives Case*, 201 N. Y. 271, 94 N. E. 431;

*Green vs. Caldwell*, 186 S. W. 648;

*New York Cent. R. R. vs. White*, *Supra*.

In view of this fact the Employers' Liability Law, by providing that the amount of damages that might be recovered by an injured employee should be determined by a jury in a proper case, avoid the very objection that has been raised in the cases above cited and in a number of other cases in which Workmen's Compulsory Compensation Acts have been passed upon by different courts. In other words, the Arizona law does not deprive the employer of the right to have the issues arising out of the injury occurring to an employee tried by a jury, but simply deprives the employer of certain common law defenses,

such as the defense of assumption of risk, contributory negligence and the defense of the negligence of a fellow servant. That such defenses may be abolished by the legislatures of different states has been decided by this Court in the cases of *New York Cent. R. R. Co. vs. White*, *supra*; *Mountain Timber Company vs. Washington*, *supra*; and by numerous decisions of the state courts.

This court having decided that an employer may be held liable in damages to an injured employee for injuries occurring in the due course of his employment, notwithstanding the fact that the injuries occurred through no fault of the employer; and this Court having previously held that the common law defenses of contributory negligence, assumption of risk, and the defense of negligence of a fellow servant may be abolished without any violation of constitutional provisions contained in the Constitution of the United States, it is difficult to concede how this Court can hold the Employers' Liability Law unconstitutional merely because it leaves the amount of damages in a proper case to be determined by a jury. This objection is untenable; for when it is once decided that compensation for injuries may be allowed, the manner for fixing compensation is purely within the power of the legislature; and the Legislature of the State of Arizona has left that question to be decided by a jury, as was stated in the case of *Western Indemnity Company vs. Pillsbury*, 151 Pac. 404 (Cal), in which case the court said:

"The essential question is whether liability for injury suffered by employees through acci-



dent may be imposed upon employers who have been guilty of no breach of duty. Once this question is answered in the affirmative, the mode of imposing the liability, whether it be by way of a proportionate contribution having some of the characteristics of a tax, or by fixing a direct liability upon each employer for each accident as it occurs, is a matter for legislative determination."

It may be true that the Arizona law is subject to criticism and that it does not contain the wise provisions of labor laws of other states. Possibly it would have been better for the state to have adopted a law similar to the Washington Compulsory Compensation Law or the New York law; but it is not within the province of this Court to inquire into the wisdom or judgment exercised by the Arizona Legislature in adopting the law in question.

"But the courts are slow to inquire into the mere wisdom of a statute. This question is so pre-eminently one for the law-making branch of the government that the courts will interfere only where there can be no two opinions as to the mischievous and evil tendencies of the act."

*State vs. Clausen*, 177 Pac. 1119, (*Wash.*)

The Arizona law in question may be out of harmony with the spirit and purpose of laws of other states regulating the relations between employer and employe; but the wisdom and propriety of the passage of a law cannot and ought not be inquired into by the courts. Where the constitutionality of a law is questioned, the inquiry of the courts is limited to

the question: What provision of the Constitution does it violate?

Laws cannot be disregarded merely because they are supposed to be repugnant to some governmental principles that lie outside of constitutional limitations. The Constitution of the State of Arizona confines to the legislative branch the authority to enact an Employers' Liability Law, and this authority the judicial branch is not at liberty to interfere with, unless the Legislature violates directly, or by necessary implication, some provision of the State or United States Constitution. Subject to this limitation the policy of the legislation or the wisdom of the propriety of it is not for the judicial branch of the government to decide.

*Commonwealth vs. Goldberg*, 180 S. W. 72  
(Ky.)

While the Arizona Employers' Liability Law may be subject to some just criticism, any plan devised by the wit of man may, in special cases, work unjustly; but the act is to be judged by its general scope and plan, and if the underlying principle is within the province of the Legislature, it should not be held unconstitutional because it is not as good as similar laws of some of the other states.

Respectfully submitted,

*Samuel Harris*

(26,070)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 603.

RAY CONSOLIDATED COPPER COMPANY,  
PLAINTIFF IN ERROR,

*vs.*

DAN VEAZEY.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR  
THE DISTRICT OF ARIZONA.

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*Complaint.*

In the United States District Court for the District of Arizona.

No. 163 (Phx.).

DAN VEAZEY, Plaintiff,

vs.

THE RAY CONSOLIDATED COPPER COMPANY, a Corporation,  
Defendant.

The plaintiff, Dan Veazey, by Struckmeyer and Jenckes, his attorneys, complaining of the defendant, The Ray Consolidated Copper Company, for cause of action against the defendant alleges:

I.

That the plaintiff is now and at the time of the grievances hereinafter mentioned was a citizen of the State of Arizona, and that the defendant, The Ray Consolidated Copper Company, now is and at the time of the grievances hereinafter mentioned was a corporation duly organized and doing business under and by virtue of the laws of the State of Maine, and that the matter in controversy in this action, exclusive of interest and costs, exceeds the sum of Three Thousand Dollars.

II.

That heretofore on to-wit, the 10th day of February, 1916, at to-wit: in the County of Gila, State of Arizona, the defendant was the owner of and then and there operated a certain ore reduction works or mill, wherein steam, electricity and other mechanical power was then and there used to operate machinery and appliances in and about such premises, and defendant was then and there constructing within said mill or reduction works a certain appliance or apparatus known as a "flotation system."

III.

2 That on the day aforesaid, to-wit, the 10th day of February, 1916, the defendant then and there had in its employ the plaintiff working in and about said mill or reduction works; that plaintiff was then and there particularly employed by defendant as a millwright and carpenter in and about the construction of the aforesaid "flotation system." That the plaintiff on the day aforesaid while then and there in the exercise of reasonable care for his own safety, suffered severe personal and bodily injuries by an accident arising out of and in the course of such labor, service and employ-

ment, and due to a condition or conditions of such occupation or employment, the said injuries being sustained in the manner following, to-wit: plaintiff in the due course of his said labor, service and employment was standing upon a certain timber or joist incorporated in said "flotation system" engaged in bolting and fastening together the timbers thereof. That the said timber or joist upon which plaintiff was then and there standing was then and there elevated above the ground or floor of said mill or reduction works a distance of approximately ten feet. That while so engaged as aforesaid, plaintiff slipped from said timber or joist and fell to the ground and plaintiff's body and limbs struck with great force and violence upon the floor of said mill or reduction works, which said floor was then and there composed of concrete. That at all times above set forth, plaintiff exercised due care for his own safety.

#### IV.

That by reason of the premises aforesaid and by reason of the force and violence with which plaintiff's said body and limbs came in contact with said concrete floor in so falling thereto as aforesaid, plaintiff sustained severe personal and bodily injuries in this: plaintiff's right wrist was broken and the bones thereof crushed, and the bones and cartilages of plaintiff's left knee were broken and dislocated, and as a result of said injuries plaintiff's said right hand and wrist have become stiffened and the action and movement thereof

impaired, and by reason thereof plaintiff has not now and  
3 never again will have the full, free and natural use of said hand and wrist; that as a result of said injuries the motion and action of plaintiff's said left knee is greatly impaired and plaintiff can not stand upright or walk without the exercise of great care and caution to avoid injury to his said left knee. That said injuries are permanent. That by reason thereof plaintiff will forever remain sick, sore, lame and crippled, and by reason of said injuries plaintiff's ability to earn a living at his usual vocation in life, to-wit: the trade of millwright and carpenter, has been greatly impaired and by reason thereof plaintiff did suffer and will forever continue to suffer great physical and mental pain and anguish.

#### V.

By reason of which premises and by virtue of the laws of the State of Arizona in such case made and provided, namely: by virtue of the provisions of Chapter 6, Title 14, Revised Statutes of the State of Arizona, 1913, relating to the "liability of employers for injuries to workmen in divers occupations" defendant is liable in damages to plaintiff for such injuries so by him sustained, and plaintiff alleges that by reason of said injuries he has sustained damages in the sum of Ten Thousand Dollars (\$10,000.00).

Wherefore, plaintiff prays judgment against the defendant for the sum of Ten Thousand Dollars (\$10,000.00) and for his costs of suit herein incurred.

STRUCKMEYER & JENCKES,  
*Attorneys for Plaintiff.*

Endorsements: "No. —. In the United States District Court in and for the District of Arizona. Dan Veazey, Plaintiff, vs. The Ray Consolidated Copper Company, a corporation, Defendant. Complaint. Filed Oct. 28 1916 at — M. Mose Drachman, Clerk. By Evelyn M. Larson, Deputy. Struckmeyer & Jenckes, Attorneys for Plaintiff. Goodrich Building, Phoenix, Arizona."

4

*Answer.*

In the United States District Court in and for the District of Arizona.

DAN VEAZEY, Plaintiff,

vs.

THE RAY CONSOLIDATED COPPER COMPANY, a Corporation,  
Defendant.

Comes now the defendant in above entitled cause and demurs to and answers the complaint of plaintiff filed herein, as follows:—

1. Demurs to said complaint upon the ground that same does not state facts sufficient to constitute a cause of action.

2. Demurs to said complaint upon the ground that recovery is therein sought under and by virtue of Chapter 6, Title 14, Revised Statutes of Arizona, 1913, Civil Code, said Act being entitled: "Liability of Employers for Injuries to Workmen in Dangerous Occupations", and that said Act is unconstitutional and void and contrary to and in violation of the 14th Amendment to the Constitution of the United States in that said Act is an attempt to deprive this defendant of its property without due process of law, and denies to this defendant the equal protection of the laws.

3. Should the foregoing demurrer be overruled, this defendant further answers said complaint and alleges, denies and admits as follows:—

a. Admits all of the allegations in Paragraph I of said complaint contained, and admits that during the times in said complaint mentioned said plaintiff was in the employ of said defendant at a certain plant then and there operated by defendant and that  
5 on the 10th of February, 1916, plaintiff met with an accident.

b. Denies each and every allegation in said complaint contained not hereinbefore expressly admitted.

c. Further answering said complaint and as a separate and affirmative defense thereto, this defendant alleges that if plaintiff was injured as in said complaint alleged, it was by reason of his own carelessness and negligence which directly and proximately contributed thereto.

d. Further answering said complaint and as a separate and affirmative defense thereto, this defendant alleges that if plaintiff was injured as in said complaint alleged it was by reason of certain dangers, risks and hazards then and there present and which had theretofore been and were then and there by him assumed.

e. Further answering said complaint and as a separate and affirmative defense thereto, defendant alleges that each and every cause of action in said complaint set forth and the recovery therein prayed for is expressly based upon and by plaintiff claimed under and by virtue of the provisions of Chapter 6, Title 14, of the Revised Statutes of Arizona, 1913, being an Act entitled: "Liability of Employers for Injuries to Workmen in Dangerous Occupations", and that said Act is null and void and contrary to and in violation of the 14th Amendment to the Constitution of the United States, in that said Act is an attempt to impose upon this defendant liability for injuries that may have been sustained by plaintiff without fault or negligence on the part of this defendant and in that it is an attempt to deprive this defendant of its property without due process of law, and denies to this defendant the equal protection of the laws.

6 Wherefore having fully answered said complaint, defendant prays that plaintiff take nothing thereunder, that same be dismissed and that it have judgment in its favor and against plaintiff for its costs herein necessarily expended.

WILLIAM H. KING,  
CHALMERS, KENT & STAHL,  
*Attorneys for Defendant.*

Endorsements: "(Original.) No. —. In the United States District Court, in and for the District of Arizona. Dan Veazey, Plaintiff, vs. The Ray Consolidated Copper Company, a corporation, Defendant. Answer. Received copy of the within Answer this 17th day of November, 1916. Struckmeyer & Jenckes, Attorney- for Plaintiff. Filed Nov. 17 1916 at — M. Mose Drachman, Clerk. By R. E. L. Webb, Deputy."

7 *Minute Entry Appearing under Date of Friday, March 2, 1917.*

In the United States District Court for the District of Arizona.

No. 163 (Phoenix).

DAN VEAZEY, Plaintiff,

vs.

RAY CONSOLIDATED COPPER COMPANY, Defendant.

The demurrer of defendant to the complaint of plaintiff coming on for argument, J. S. Jenckes, Esq., of counsel for plaintiff, and H. M. Fennemore, Esq., of counsel for defendant, appearing in open Court and the Court having heard the arguments of counsel, orders that said demurrer be and the same is hereby sustained as to Paragraph III of said complaint and overruled as to the remaining paragraphs thereof, to which defendant excepts.



8

*Amended Complaint.*

In the United States District Court for the District of Arizona.

No. 163.

DAN VEAZEY, Plaintiff,

vs.

THE RAY CONSOLIDATED COPPER COMPANY, a Corporation,  
Defendant.

The plaintiff, Dan Veazey, by Struckmeyer and Jenckes, his attorneys, complaining of the defendant, The Ray Consolidated Copper Company, for cause of action against the defendant alleges:

I.

That the plaintiff is now and at the time of the grievances herein-after mentioned was a citizen of the State of Arizona, and that the defendant, The Ray Consolidated Copper Company, now is and at the time of the grievances hereinafter mentioned was a corporation duly organized and doing business under and by virtue of the laws of the State of Maine, and that the matter in controversy in this action, exclusive of interest and costs, exceeds the sum of Three Thousand Dollars.

II.

That heretofore on to-wit, the 10th day of February, 1916, at to-wit: in the County of Gila, State of Arizona, the defendant was the owner of and then and there operated a certain ore reduction works or mill, wherein steam, electricity and other mechanical power was then and there used to operate machinery and appliances in and about such premises, and defendant was then and there constructing within said mill or reduction works a certain appliance or apparatus known as a "flotation system."

9

III.

That on the day aforesaid, to-wit, the 10th day of February, 1916, the defendant then and there had in its employ the plaintiff working in and about said mill or reduction works; that plaintiff was then and there particularly employed by defendant as a millwright and carpenter in and about the construction of the aforesaid "flotation system." That the plaintiff on the day aforesaid suffered severe personal and bodily injuries by an accident arising out of and in the course of such labor, service and employment, and due to a condition or conditions of such occupation or employment, and which said injuries were not caused by the negligence of the plaintiff; the said

injuries being sustained in the manner following, to-wit: plaintiff in the due course of his said labor, service and employment was standing upon a certain timber or joist incorporated in said "flotation system" engaged in bolting and fastening together the timbers thereof. That the said timber or joist upon which plaintiff was then and there standing was then and there elevated above the ground or floor of said mill or reduction works a distance of approximately ten feet. That while so engaged as aforesaid, plaintiff slipped from said timber or joist and fell to the ground and plaintiff's body and limbs struck with great force and violence upon the floor of said mill or reduction works, which said floor was then and there composed of concrete. That at all times above set forth, plaintiff exercised due care for his own safety.

#### IV.

That by reason of the premises aforesaid and by reason of the force and violence with which plaintiff's said body and limbs came in contact with said concrete floor in so falling thereto as aforesaid, plaintiff sustained severe personal and bodily injuries in this: plaintiff's right wrist was broken and the bones thereof crushed, and the bones and cartilages of plaintiff's left knee were broken and dislocated, and

10 as a result of said injuries plaintiff's said right hand and wrist have become stiffened and the action and movement thereof impaired, and by reason thereof plaintiff has not now and never again will have the full, free and natural use of said hand and wrist; that as a result of said injuries the motion and action of plaintiff's said left knee is greatly impaired and plaintiff can not stand upright or walk without the exercise of great care and caution to avoid injury to his said left knee. That said injuries are permanent. That by reason thereof plaintiff will forever remain sick, sore, lame and crippled, and by reason of said injuries plaintiff's ability to earn a living at his usual vocation in life, to-wit: the trade of millwright and carpenter, has been greatly impaired and by reason thereof plaintiff did suffer and will forever continue to suffer great physical and mental pain and anguish.

#### V.

By reason of which premises and by virtue of the laws of the State of Arizona in such case made and provided, namely: by virtue of the provisions of Chapter 6, Title 14, Revised Statutes of the State of Arizona, 1913, relating to the "liability of employers for injuries to workmen in divers occupations" defendant is liable in damages to plaintiff for such injuries so by him sustained, and plaintiff alleges that by reason of said injuries he has sustained damages in the sum of Ten Thousand Dollars (\$10,000.00).

Wherefore, plaintiff prays judgment against the defendant for the sum of Ten Thousand Dollars (\$10,000.00) and for his costs of suit herein incurred.

STRUCKMEYER & JENCKES,  
*Attorneys for Plaintiff.*

Endorsements: "No. —. In the United States District Court in and for the District of Arizona. Dan Veazey, Plaintiff, vs. The Ray Consolidated Copper Company, a corporation, Defendant. Amended complaint. Filed Mar. 3 1917 at — M. Mose Drachman, Clerk. By Ethel A. Webb, Deputy. Struckmeyer & Jenckes, Attorneys for Plaintiff, Goodrich Building, Phoenix, Arizona. Rec'd copy of within Amended Complaint March 3rd, 1917. Chalmers, Kent & Stahl, Att'ys for defendant."

11 *Minute Entry Appearing under Date of Monday, April 2, 1917.*

In the United States District Court for the District of Arizona.

No. 163 (Phoenix).

DAN VEAZEY, Plaintiff,

vs.

RAY CONSOLIDATED COPPER COMPANY, Defendant.

The plaintiff having heretofore filed his amended complaint in the above entitled cause, the defendant in open court elects to stand upon the demurrer and answer to plaintiff's original complaint as demurrer and answer to plaintiff's amended complaint, and the said demurrer to the plaintiff's amended complaint is overruled, to which defendant duly excepts.

12 *Minute Entry Appearing under Date of Thursday, April 5, 1917.*

In the United States District Court for the District of Arizona.

No. 163 (Phoenix).

DAN VEAZEY, Plaintiff,

vs.

RAY CONSOLIDATED COPPER COMPANY, Defendant.

The above entitled cause came on regularly for trial this day, F. C. Struckmeyer, Esquire, appearing upon behalf of the plaintiff, and H. M. Fennemore, Esquire, and F. M. Stahl, Esquire, counsel for the defendant, being present in open Court, and both sides announce themselves ready for trial. Whereupon, the Court directs the Clerk to draw from the Jury Box the names of 18 jurors, their names are called and all answering thereto, respectively, take their places in the jury box. D. A. Little is duly sworn as Court Reporter in this case. Thereupon, said jurors are duly sworn on their voir dire and examined as to their qualifications and all are found to be

qualified and are accepted by both sides. Whereupon, both sides exercise their right to strike and the remaining 12 names on the list are selected by the Clerk, as follows, to-wit: A. Champagne, Clyde W. Hunt, E. J. Jordan, J. M. Hall, J. A. Rollins, Chas. G. Cooper, Henry Wentworth, A. L. West, Wm. P. Cooper, Carl Anderson, W. I. Davidson and Lee Pritt, who are duly sworn to well and truly try the issue joined between the plaintiff and defendant herein.

Whereupon, counsel for the defendant make the following objection:

13     “If the Court please, we object to any statement of the plaintiff or the introduction of any evidence in this case, on the ground that this action is brought under the provisions of what is known as the Employers’ Liability Act, which is Chapter 6, Title 14, of the Revised Statutes of Arizona, 1913, entitled An Act Providing for Liability of Employers for Injuries to Workmen in Dangerous Occupations, on the ground that this act under which the action is brought is unconstitutional and in violation of the Fourteenth Amendment to the Constitution of the United States and that it will deprive the defendant of its property without due process of law and would deny to the defendant the equal protection of the law and that the amended complaint brought under this act does not state facts sufficient to constitute a cause of action, for the reason that the act under which the amended complaint is brought is unconstitutional.”

and, upon consideration thereof by the Court,

It is ordered that said objection be and the same is overruled and denied, to which ruling and action of the Court the defendant excepts.

Whereupon, the amended complaint of the plaintiff is read aloud to the jury by F. C. Struckmeyer, Esquire, and, thereupon, H. M. Fennemore, Esquire, reads aloud to the jury the answer of the defendant thereto.

The plaintiff then, to maintain upon his part the issue herein, calls Dennis T. Veasey and William H. Sargent as witnesses upon behalf of the plaintiff, and they are duly sworn, examined and cross-examined. Plaintiff offers in evidence exhibits A and B, being x-ray photographs, which are objected to by counsel for the defendant; and, upon consideration thereof by the Court,

It is ordered that said objections by the defendant to the admission of said exhibits be and the same are hereby overruled, to which ruling and action of the Court the defendant, by counsel, excepts. Whereupon, said exhibits are ordered admitted and filed. O. E. Plath is duly sworn as a witness upon behalf of the plaintiff, examined and cross-examined. Whereupon, plaintiff, reserving the

14     right to introduce in evidence the American Mortality Table, counsel for both sides having stipulated in open Court that same may be admitted later, rests his case.

F. M. Stahl, Esquire, one of counsel for the defendant herein, thereupon, moves the Court for a directed verdict in favor of the de-

fendant; same is argued by counsel; and, upon consideration thereof by the Court,

It is ordered that said motion be and the same is hereby denied.

The defendant then to maintain upon its part the issue herein, calls H. R. Christie as a witness upon behalf of the defendant and he is duly sworn, and examined in part.

The hour for adjournment having arrived and the trial of the case not being completed, the Court admonishes the jury and orders the further trial hereof adjourned and continued until Friday, the 6th day of April, A. D. 1917, at the hour of 9:30 o'clock A. M.

15 *Minute Entry Appearing under Date of Friday, April 6, 1917.*

In the United States District Court for the District of Arizona.

No. 163 (Phoenix).

DAN VEAZEY, Plaintiff,

vs.

RAY CONSOLIDATED COPPER COMPANY, Defendant.

Pursuant to an order of continuance made on yesterday, trial of the above entitled cause is this day resumed, F. C. Struckmeyer, Esquire, counsel for the plaintiff, and F. M. Stahl, Esquire, and H. M. Fennemore, Esquire, counsel for the defendant, the Court Reporter and all jurors being present in open Court.

Whereupon, H. R. Christie is recalled to the stand for completion of his examination as a witness upon behalf of the defendant and he is examined and cross-examined. W. Warner Watkins is duly sworn as a witness upon behalf of the defendant and is examined and cross-examined. Thereupon, the defendant offers in evidence defendant's exhibits Nos. 1 and 2, being certain x-ray photographs, which said exhibits are objected to by counsel for the plaintiff; and upon consideration thereof by the Court,

It is ordered that said objection be and the same is hereby sustained and the said exhibits are ordered excluded from the record, to which ruling and action of the Court counsel for the defendant excepts. Whereupon, E. Payne Palmer, Robert B. Tarbat, Samuel H. Kirk and Charles H. Thew are duly sworn as witnesses upon behalf of the defendant and are examined and cross-examined. Thereupon, the defendant rests its case.

16 There being no further testimony offered and the evidence being closed, argument of counsel is had, and requests in writing for instructions to the jury are made by the Court by both parties, and each party thereupon moves the Court to instruct the jury in accordance with such respective requests, and the Court having considered such requests, endorses his ruling in writing thereon and orders same filed with records in this cause. Thereupon, counsel for plaintiff except to the ruling of the court in refusing to instruct the

jury in each instance where such plaintiff's request was denied by the Court, and the defendant duly excepts to the ruling of the Court in each instance where the defendant's request was denied by the Court; and the Court instructs the jury orally, the delivery of written instructions having in open Court been expressly waived. Whereupon, said jury, in charge of their bailiff, A. J. Stark, first duly sworn for such purpose, retire to their room to consider of their verdict.

The hour for adjournment having arrived and the jury herein having not agreed upon a verdict, consent of counsel for both sides having first been obtained, the Court admonishes said jury and grants them permission to separate until tomorrow morning, Saturday, April 7, 1917, at the hour of 9:30 o'clock.

17 *Minute Entry Appearing under Date of Saturday, April 7, 1917.*

In the United States District Court for the District of Arizona.

No. 163 (Phoenix).

DAN VEAZEY, Plaintiff,

vs.

RAY CONSOLIDATED COPPER COMPANY, Defendant.

Pursuant to an order of continuance made on yesterday, trial of the above entitled cause is this day resumed, F. C. Struckmeyer, Esquire, counsel for the plaintiff, and F. M. Stahl, Esq., and H. M. Fennemore, Esquire, counsel for the defendant, and all jurors being present in open Court. Whereupon, said jury, in charge of their bailiff, again retire to consider of their verdict. After a short time, said jury, in charge of their bailiff, return into open court, and upon being asked if they have agreed upon a verdict, through their foreman, state that they have agreed. Whereupon, said jury, through their foreman, present their verdict, which is ordered spread upon the minutes of the Court in full, as follows, to-wit:

"DAN VEAZEY, Plaintiff,

against

THE RAY CONSOLIDATED COPPER COMPANY, Defendant.

*Verdict.*

We, the Jury, duly empaneled and sworn in the above entitled action, upon our oaths, do find for the Plaintiff and assess his damages at (3,000) Three thousand Dollars.

J. M. HALL, Foreman."

and the clerk inquiring of said jury if such is their verdict, they state that it is and so say they all. Thereupon, said jury is ordered discharged from the case.

18 Whereupon, it is ordered, adjudged and decreed that judgment be entered in favor of the plaintiff and against the defendant herein in the sum of \$3,000.00, in accordance with the verdict of the said jury, to which order defendant duly excepts.

19 *Requests of Defendant for Instructions to Jury.*

In the United States District Court for the District of Arizona.

No. 163.

DAN VEAZEY, Plaintiff,

VS.

THE RAY CONSOLIDATED COPPER COMPANY, a Corporation,  
Defendant.

Comes now the defendant in the above entitled cause and hereby moves the Court to charge the jury as set forth in its request Number 1 and bases its said motion to so charge as set forth in said request Number 1 upon the grounds set forth immediately following said request.

Number 1.

The jury is hereby instructed and directed to render a verdict in favor of the Defendant and against the Plaintiff herein.

The foregoing motion to direct the jury to render a verdict in favor of the Defendant and against Plaintiff is made and based upon the following grounds:

(a) That the cause of action in the Amended Complaint of the plaintiff upon which he is now relying, is expressly based upon and recovery is therein expressly sought under the provisions of Chapter 6, Title 14, Revised Statutes of Arizona, 1913, Civil Code, said Act being entitled: "Liability of Employers for Injuries to Workmen in Dangerous Occupations." That said Act is unconstitutional and void and Plaintiff is entitled to no recovery or relief thereunder for the reason that said Act imposes upon this Defendant unlimited liability for injury or injuries sustained by Plaintiff without fault or negligence on the part of this Defendant, and said Act is contrary to and in violation of the Fourteenth Amendment to the Constitution of the United States in that it deprives this Defendant of its property without due process of law and denies to this Defendant the equal protection of the laws.

20 Endorsements: "Refused. Wm. H. Sawtelle, Judge." "No. 163—Phx. In the United States District Court, for the District of Arizona. Dan Veazey, Plaintiff vs. The Ray Consolidated Copper



Company, a corporation, Defendant. Requests of Defendant for Instructions to Jury. Filed Apr. 17 1917 at — M. Mose Drachman, Clerk. By R. E. L. Webb, Deputy. Chalmers, Kent & Stahl, Attorneys and Counsellors at Law, 205-208 Fleming Block, Phoenix, Arizona, Attorneys for Defendant."

21 *Minute Entry Appearing under Date of Monday, April 16, 1917.*

In the United States District Court for the District of Arizona.

No. 163 (Phoenix).

DAN VEAZEY, Plaintiff,

vs.

RAY CONSOLIDATED COPPER COMPANY, Defendant.

Comes now the defendant in the above entitled cause by his attorneys of record, and makes application of the court for an order extending the time in which the defendant may prepare and serve bill of exceptions in this case, and thereupon the Court duly orders that the time in which the defendant may prepare and serve his bill of exceptions herein is extended up to and including May 16, 1917.

22 In the United States District Court for the District of Arizona.

No. 163.

DAN VEAZEY, Plaintiff,

vs.

THE RAY CONSOLIDATED COPPER COMPANY, a Corporation,  
Defendant.

Comes now the Defendant, Ray Consolidated Copper Company, and moves the Court that an extension of time be granted to it, the Defendant, until May 21st in which to prepare and serve its Bill of Exceptions on appeal in said cause.

Dated this 9th day of May, A. D., 1917.

CHALMERS, KENT & STAHL,  
*Attorneys for Defendant.*

The above named Plaintiff by his Attorneys consents to the above extension.

STRUCKMEYER & JENCKES,  
*Attorneys for Plaintiff.*



Endorsements: "No. 163. In the United States District Court for the District of Arizona. Dan Veazey, Plaintiff, vs. The Ray Consolidated Copper Company, a corporation, Defendant. Filed May 10th, 1917. Mose Drachman, Clerk. Chalmers, Kent & Stahl, Attorneys and Counsellors at Law, 205-208 Fleming Block, Phoenix, Arizona, Attorneys for Defendant."

23 *Minute Entry Appearing under Date of Thursday, May 10, 1917.*

In the United States District Court for the District of Arizona.

No. 163 (Phoenix).

DAN VEAZEY, Plaintiff,

VS.

RAY CONSOLIDATED COPPER COMPANY, Defendant.

Stipulation of the parties in the above entitled cause having heretofore been filed, agreeing that the time in which the defendant may prepare and serve its bill of exceptions in this case may be extended to and including the 21st day of May, 1917, it is ordered that the said time in which the defendant may prepare and serve its said bill of exceptions is hereby extended, for good cause shown, up to and including the 21st day of May, 1917.

24 *Bill of Exceptions.*

In the District Court of the United States in and for the District of Arizona.

No. 163.

DAN VEAZEY, Plaintiff,

VS.

RAY CONSOLIDATED COPPER COMPANY, a Corporation, Defendant.

Be it remembered that on the 2d day of April, A. D., 1917, the Plaintiff herein having heretofore filed his Amended Complaint, and the Defendant having on this day elected in open court to stand upon its Demurrer and Answer to Plaintiff's First Complaint as Demurrer and Answer to the Amended Complaint of Plaintiff, and the Demurrer coming on for argument, and the said Demurrer being as follows, to-wit:

"Demurs to said complaint upon the ground that same does not state facts sufficient to constitute a cause of action.

"Demurs to said complaint upon the ground that recovery is

therein sought under and by virtue of Chapter 6, Title 14, Revised Statutes of Arizona, 1913, Civil Code, said Act being entitled: 'Liability of Employers for Injuries to Workmen in Dangerous Occupations,' and that said Act is unconstitutional and void and contrary to and in violation of the 14th Amendment to the Constitution of the United States in that said Act is an attempt to deprive this defendant of its property without due process of law, and denies to this defendant the equal protection of the laws."

And the Court being advised duly overruled the said demurrer and the whole thereof, to which the said Defendant, by its counsel, duly excepted, which exception was by the Court then and there allowed;

25 And be it further remembered, that on the 5th day of April, 1917, the above entitled cause came on for trial upon the Amended Complaint of the Plaintiff theretofore filed therein, the Defendant having elected to stand upon its Answer to the original Complaint of the Plaintiff theretofore filed therein as Answer to the Amended Complaint.

Whereupon, a jury of twelve men was duly impaneled and sworn to try the cause.

Whereupon, the Defendant, through its attorneys, in the presence of the jury, made the following objection:

"By Mr. Stahl: If the Court please, we object to any statement of the Plaintiff or the introduction of any evidence in this case, on the ground that this action is brought under the provisions of what is known as the Employers' Liability Act, which is Chapter 6, Title 14, of the Revised Statutes of Arizona, 1913, entitled An Act Providing for Liability of Employers for Injuries to Workmen in Dangerous Occupations, on the ground that this act under which the action is brought is unconstitutional and in violation of the Fourteenth Amendment to the Constitution of the United States, in that the act imposes an unlimited liability upon employers and upon this Defendant without any fault on its part and that the act violates the Fourteenth Amendment to the Constitution of the United States and that it will deprive the Defendant of its property without due process of law and would deny to the Defendant the equal protection of the law and that the amended complaint brought under this act does not state facts sufficient to constitute a cause of action, for the reason that the act under which the amended complaint is brought is unconstitutional."

Whereupon, the said objection of the Defendant was overruled and denied by the Court, and exception to the said ruling of the Court was thereupon taken by the Defendant, which exception was by the Court then and there allowed.

Whereupon, evidence on the part of the Plaintiff was duly introduced, and evidence on the part of the Defendant was duly introduced, and upon the completion of the introduction of testimony on behalf of the Defendant, and both parties having rested their case,

26 the Defendant, by its attorneys, thereupon moved and requested the Court to instruct the jury to return a verdict for the Defendant, said Motion being as follows, to-wit:

"Comes now the Defendant in the above entitled cause and hereby moves the Court to charge the jury as set forth in its request Number 1 and bases its said motion to so charge as set forth in said request Number 1 upon the grounds set forth immediately following said request.

Number 1.

"The jury is hereby instructed and directed to render a verdict in favor of the defendant and against the plaintiff herein.

"The foregoing motion to direct the jury to render a verdict in favor of the defendant and against plaintiff is made and based upon the following grounds:

"(a) That the cause of action in the Amended Complaint of the plaintiff upon which he is now relying, is expressly based upon and recovery is therein expressly sought under the provisions of Chapter 6, Title 14, Revised Statutes of Arizona, 1913, Civil Code, said Act being entitled: 'Liability of Employers for Injuries to Workmen in Dangerous Occupations.' That said Act is unconstitutional and void and plaintiff is entitled to no recovery or relief thereunder for the reason that said Act imposes upon this defendant unlimited liability for injury or injuries sustained by plaintiff without fault or negligence on the part of this defendant, and said Act is contrary to and in violation of the Fourteenth Amendment to the Constitution of the United States in that it deprives this defendant of its property without due process of law and denies to this defendant the equal protection of the laws."

Whereupon, the Court overruled and denied said Motion, to which ruling and denial the Defendant, by its attorneys, duly took exception, which exception was by the Court then and there allowed.

Whereupon, after receiving instructions from the Court the jury retired and considered of its verdict and returned in to Court its verdict finding the issues in the cause in favor of the Plaintiff and against the Defendant, and assessing the Plaintiff's damages at the sum of Three Thousand (\$3,000) Dollars.

Wherefore, Defendant prays that this its Bill of Exceptions may be allowed, settled and signed.

WILLIAM H. KING,  
CHALMERS, KENT & STAHL,  
*Attorneys for Defendant.*

Service of copy of foregoing Bill of Exceptions is hereby acknowledged on this date. The Plaintiff has and will have no amendments to propose thereto, agrees that said Bill is true and consents that same may be presented to the Judge of this Court for allowance, settlement and certification without further notice.

Dated this 18th day of May, A. D., 1917.

STRUCKMEYER & JENCKES,  
*Attorneys for Plaintiff.*

I hereby certify that the foregoing Bill of Exceptions is true and same is settled and approved this 24th day of May A. D., 1917, in term.

WM. H. SAWTELLE, *Judge.*

Endorsements: "In the District Court of the United States, in and for the District of Arizona. Dan Veazey, Plaintiff, vs. Ray Consolidated Copper Company, a corporation, Defendant. Bill of Exceptions. Lodged in Clerk's Office May 21, 1917 at — M. Mose Drachman, Clerk. By R. E. L. Webb, Deputy. Filed May 26 1917 at — M. Mose Drachman, Clerk. By R. E. L. Webb, Deputy."

28

*Petition for Writ of Error.*

In the District Court of the United States in and for the District of Arizona.

#163.

DAN VEAZEY, Plaintiff (Defendant in Error),

vs.

RAY CONSOLIDATED COPPER COMPANY, a Corporation, Defendant  
(Plaintiff in Error).

To the Honorable William H. Sawtelle, Judge of the District Court aforesaid:

Now comes the Ray Consolidated Copper Company, a corporation organized and existing under and by virtue of the laws of the State of Maine, and the Defendant (Plaintiff in Error) in the above entitled cause, by its attorneys of record, and respectfully shows that the Court erred therein in that on the 2nd day of April, 1916, the Court overruled the Demurrer of this Defendant (Plaintiff in Error) to Plaintiff's (Defendant's in Error) Amended Complaint, and thereafter during the trial of this cause overruled the objection of this Defendant (Plaintiff in Error) to the introduction of any evidence on behalf of Plaintiff (Defendant in Error) and denied the Motion of Defendant (Plaintiff in Error) to instruct the jury as requested by Defendant (Plaintiff in Error) all to the prejudice of the Defendant (Plaintiff in Error) as fully appears in detail from the Assignments of Error which is filed with this Petition; and that on the 7th day of April, A. D., 1917, a jury, duly impaneled, found a verdict against your Petitioner and in favor of Dan Veazey, the Plaintiff (Defendant in Error) above named, and that upon

29 said verdict a final judgment was entered on the 7th day of April, A. D., 1917, against your Petitioner, the Defendant (Plaintiff in Error) herein; and your Petitioner, feeling itself aggrieved by the said errors and said verdict and judgment entered thereon as aforesaid, herewith petitions the Court for an Order allow-

ing it to prosecute Writ of Error to the Supreme Court of the United States under the laws of the United States in such cases made and provided.

Wherefore, the premises considered, your Petitioner prays that a Writ of Error do issue in this behalf out of the Supreme Court of the United States sitting at Washington, D. C. for the correction of the errors complained of and herewith assigned, be allowed, and that an Order be made fixing the amount of security to be given by the Plaintiff in Error conditioned as the law directs, and upon giving such bond as may be required that all further proceedings may be suspended until the determination of said Writ of Error by the Supreme Court of the United States, and that a transcript of the records, proceedings and the papers in this cause, duly authenticated, may be sent to the Supreme Court of the United States aforesaid.

RAY CONSOLIDATED COPPER COMPANY,

By WILLIAM H. KING.

CHALMERS, KENT & STAHL,

*Attorneys for Petitioner in Error.*

Endorsements: "In the District Court of the United States in and for the District of Arizona. Dan Veazey, Plaintiff (Defendant in Error) vs. Ray Consolidated Copper Company, a corporation, Defendant (Plaintiff in Error). At Law No. 163. Petition for Writ of Error. Service of copy of within acknowledged this — day of June, 1917. — — —, Attorney for Plaintiff (Defendant in Error). Filed June 9th, 1917. Mose Drachman, Clerk."

### 30 *Assignments of Error and Prayer for Reversal.*

In the District Court of the United States in and for the District of Arizona.

At Law. No. 163.

DAN VEAZEY, Plaintiff (Defendant in Error),

vs.

RAY CONSOLIDATED COPPER COMPANY, a Corporation, Defendant  
(Plaintiff in Error).

Now comes the Ray Consolidated Copper Company, Defendant (Plaintiff in Error) in the above numbered and entitled cause and in connection with its Petition for a Writ of Error in this cause assigns the following errors which it avers occurred in the rulings of the Court therein and on the trial thereof and upon which it relies to reverse the Judgment entered herein as appears of record.

## I.

That the Court erred in overruling the Demurrer of the Defendant (Plaintiff in Error) to the Amended Complaint filed in this cause, as follows:

"Demurs to said (Amended) Complaint upon the ground that same does not state facts sufficient to constitute a cause of action.

"Demurs to said (Amended) Complaint upon the ground that recovery is therein sought under and by virtue of Chapter 6, Title 14, Revised Statutes of Arizona, 1913, Civil Code, said Act being entitled: 'Liability of Employers for Injuries to Workmen in Dangerous Occupations,' and that said Act is unconstitutional and void and contrary to and in violation of the 14th Amendment to the Constitution of the United States in that said Act is an attempt to deprive this defendant of its property without due process of law and denies to this defendant the equal protection of the laws."

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## II.

That the Court erred in overruling the first ground of Demurrer of the Defendant (Plaintiff in Error) to the Amended Complaint of Plaintiff (Defendant in Error) filed in this cause, which said demurrer is upon the ground that said Amended Complaint does not state facts sufficient to constitute a cause of action, and in holding that said Amended Complaint does state a cause of action.

This Assignment is urged for the reason that said Amended Complaint shows on its face that recovery is therein sought under and by virtue of Chapter 6, Title 14, Revised Statutes of Arizona, 1913, entitled "An Act Providing for Liability of Employers for Injuries to Workmen in Dangerous Occupations," which said Act is unconstitutional and in violation of the 14th Amendment to the Constitution of the United States in that the Act imposes an unlimited liability upon employers and upon this Defendant (Plaintiff in Error) without any fault on the part of such employers and of this Defendant (Plaintiff in Error) and that said Act would deprive this Defendant (Plaintiff in Error) of its property without due process of law and would deny to it the equal protection of the laws.

## III.

That the Court erred in overruling the second ground of Demurrer of the Defendant (Plaintiff in Error) to the Amended Complaint of the Plaintiff (Defendant in Error) filed in this cause, as follows:

"Demurs to said (Amended) Complaint upon the ground that recovery is therein sought under and by virtue of Chapter 6, Title 14, Revised Statutes of Arizona, 1913, Civil Code, said Act being entitled: 'Liability of Employers for Injuries to Workmen in Dangerous Occupations,' and that said Act is unconstitutional and void and contrary to and in violation of the 14th Amendment to the Con-

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stitution of the United States in that said Act is an attempt to deprive this defendant of its property without due process of law, and denies to this defendant the equal protection of the laws."

This assignment is urged for the reason that said Act is unconstitutional and void and contrary to and in violation of the 14th Amendment to the Constitution of the United States and would deprive this Defendant (Plaintiff in Error) of its property without due process of law, and would deny to this Defendant (Plaintiff in Error) the equal protection of the laws as fully set forth in said ground of Demurrer, in that it imposes upon employers and upon this Defendant (Plaintiff in Error) herein unlimited liability for injuries sustained by employees without fault or negligence on the part of such employers and of this Defendant (Plaintiff in Error).

#### IV.

That the Court erred in not sustaining the objection of the Defendant (Plaintiff in Error) to the making of any statement to the jury on behalf of the Plaintiff (Defendant in Error) and to the introduction of any evidence on behalf of the Plaintiff (Defendant in Error) which objection, in which is stated the grounds thereof, is as follows, to-wit:

“By Mr. Stahl: If the Court please, we object to any statement of the Plaintiff or the introduction of any evidence in this case, on the ground that this action is brought under the provisions of what is known as the Employers’ Liability Act, which is Chapter 6, Title 14, of the Revised Statutes of Arizona, 1913, entitled ‘An Act Providing for Liability of Employers for Injuries to Workmen in Dangerous Occupations,’ on the ground that this act under which the action is brought is unconstitutional and in violation of the Fourteenth Amendment to the Constitution of the United States, in that the act imposes an unlimited liability upon employers and upon this Defendant without any fault on its part and that the act violates the Fourteenth Amendment to the Constitution of the United States and that it will deprive the Defendant of its property without due process of law and would deny to the Defendant the equal protection of the law, and that the Amended Complaint brought under this act does not state facts sufficient to constitute a cause of action, for the reason that the act under which the Amended Complaint is brought is unconstitutional.”

#### V.

That the Court erred in overruling and denying the Motion and request of the Defendant (Plaintiff in Error) to instruct the jury to return a verdict in favor of the Defendant (Plaintiff in Error) and against the Plaintiff (Defendant in Error) after the introduction of all testimony in the case, and upon the Defendant (Plaintiff in Error) resting its case, which Motion and request is as follows and made upon the grounds therein stated, to-wit:

“Comes now the Defendant in the above entitled cause and hereby moves the Court to charge the jury as set forth in its request Number 1 and bases its said motion to so charge as set forth in said request Number 1 upon the grounds set forth immediately following said request.



## Number 1.

The jury is hereby instructed and directed to render a verdict in favor of the Defendant and against the Plaintiff herein.

The foregoing motion to direct the jury to render a verdict in favor of the Defendant and against Plaintiff is made and based upon the following grounds:

(a) That the cause of action in the Amended Complaint of the Plaintiff upon which he is now relying, is expressly based upon and recovery is therein expressly sought under the provisions of Chapter 6, Title 14, Revised Statutes of Arizona, 1913, Civil Code, said Act being entitled: 'Liability of Employers for Injuries to Workmen in Dangerous Occupations.' That said Act is unconstitutional and void and Plaintiff is entitled to no recovery or relief thereunder for the reason that said Act imposes upon this Defendant unlimited liability for injury or injuries sustained by Plaintiff without fault or negligence on the part of this Defendant, and said Act is contrary to and in violation of the Fourteenth Amendment to the Constitution of the United States in that it deprives this Defendant of its property without due process of law and denies to this Defendant the equal protection of the laws."

34 Wherefore, Defendant (Plaintiff in Error) prays that the Judgment of said Court be reversed.

RAY CONSOLIDATED COPPER COMPANY.

By WILLIAM H. KING.

CHALMERS, KENT & STAHL,

*Attorneys for Defendant.*

Endorsements: "In the District Court of the United States in and for the District of Arizona. Dan Veazey, Plaintiff (Defendant in Error) vs. Ray Consolidated Copper Company, a corporation, Defendant (Plaintiff in Error). At Law No. 163. Assignments of Error and Prayer for Reversal. Service of a copy of within acknowledged this — day of June, 1917. — — —, Attorney for Plaintiff (Defendant in Error). Filed June 9th, 1917. Mose Drachman, Clerk."



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*Stipulation.*

In the District Court of the United States in and for the District of Arizona.

#163.

DAN VEAZEY, Plaintiff (Defendant in Error),

vs.

RAY CONSOLIDATED COPPER COMPANY, a Corporation, Defendant  
(Plaintiff in Error).

The Plaintiff (Defendant in Error), Dan Veazey, by his Attorneys, hereby acknowledges receipt of a copy of the following papers on Writ of Error in this cause:

1. Petition for Writ of Error.
2. Assignments of Error.
3. Proposed Order Granting Writ of Error.
4. Proposed Writ of Error.
5. Proposed Supersedeas Bond.

Waiver is hereby made of any objection to the form thereof, and consent is hereby given that said Supersedeas Bond may be approved.

Dated this 8th day of June, 1917.

STRUCKMEYER & JENCKES,

*Attorneys for Plaintiff*

*(Defendant in Error).*

Endorsements: "No. —. In the District Court of the United States, in and for the District of Arizona. Dan Veazey, Plaintiff (Defendant in Error) vs. Ray Consolidated Copper Company, a corporation, Defendant (Plaintiff in Error). Stipulation. Filed June 9th, 1917. Mose Drachman, Clerk. Chalmers, Kent & Stahl, 205-208 Fleming Building, Phoenix, Ariz., Attorneys for Defendant (Plaintiff in Error)."

*Order Granting Writ of Error.*

In the District Court of the United States in and for the District of  
Arizona.

#163.

DAN VEAZEY, Plaintiff (Defendant in Error),

vs.

RAY CONSOLIDATED COPPER COMPANY, a Corporation, Defendant  
(Plaintiff in Error).

Upon reading the Petition for Writ of Error heretofore filed in this cause by the Ray Consolidated Copper Company, Defendant (Plaintiff in Error) above named, and the Court being fully advised thereon, the said Writ of Error is granted on this 9th day of June, A. D., 1917, and all further proceedings in said cause are hereby stayed until the determination of the Writ of Error by the Supreme Court of the United States, upon the said Defendant filing a super-seedeas bond in the sum of Five Thousand Dollars, conditioned as the law directs.

Dated this 9th day of June, A. D., 1917.

WM. H. SAWTELLE, *Judge.*

Endorsements: "In the District Court of the United States in and for the District of Arizona. Dan Veazey, Plaintiff (Defendant in Error) vs. Ray Consolidated Copper Company, a corporation, Defendant (Plaintiff in Error). At Law No. 163. Order Granting Writ of Error. Service of copy of within acknowledged this — day of June, 1917. — — —, Attorney for Plaintiff (Defendant in Error). Filed June 9th 1917. Mose Drachman, Clerk."

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*Writ of Error.*

In the District Court of the United States in and for the District of Arizona.

#163.

DAN VEAZEY, Plaintiff (Defendant in Error),

vs.

RAY CONSOLIDATED COPPER COMPANY, a Corporation, Defendant  
(Plaintiff in Error).

UNITED STATES OF AMERICA, ss:

The President of the United States to the Honorable Judge of the  
United States District Court for the District of Arizona, Greeting:

Because in the records and proceedings, as also in the rendition of the judgment, of a plea which is in the said District Court before you, between Dan Veazey, Plaintiff, and Ray Consolidated Copper Company, Defendant, a manifest error has happened, to the great damage of the said Defendant, Ray Consolidated Copper Company, as by its Complaint appears, we being willing that error, if any hath been, shall be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this Writ, so that you have the same in Washington, D. C. within sixty (60) days of the date of this Writ in the said Supreme Court of the United States, to be then and there held, that the records and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done thereon to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, this 9th day of June, A. D., 1917.

MOSE DRACHMAN,  
*Clerk of the United States District Court  
for the District of Arizona.*

Allowed:

This 9 day of June A. D., 1917.

WM. H. SAWTELLE,  
*United States District Judge.*

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[Endorsed:] In the District Court of the United States in and for the District of Arizona. At Law. No. 163. Dan

Veazey, Plaintiff (Defendant in Error), vs. Ray Consolidated Copper Company, a corporation, Defendant (Plaintiff in Error). Writ of Error. Service of copy of within acknowledged this — day of June, 1917. — — —, Attorney for Plaintiff (Defendant in Error). Filed June 9th, 1917. Mose Drachman, clerk.

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*Supersedeas Bond.*

In the District Court of the United States in and for the District of Arizona.

#163.

DAN VEAZEY, Plaintiff (Defendant in Error),

vs.

RAY CONSOLIDATED COPPER COMPANY, a Corporation, Defendant (Plaintiff in Error).

Know all men by these presents: That Ray Consolidated Copper Company, a corporation, as principal, and Hartford Accident and Indemnity Company, of Hartford, Connecticut, a corporation organized under the laws of the State of Connecticut and duly qualified and authorized to become surety upon bonds in the State of Arizona and in all proceedings in the United States District Court for the District of Arizona, as surety, are held and firmly bound unto Dan Veazey, in the full and just sum of Five Thousand Dollars to be paid to the said Dan Veazey, his executors, administrators or assigns, to which payment well and truly to be made we bind ourselves, our successors and assigns, jointly and severally by these presents.

The condition of the above obligation is such that

Whereas lately at a regular term of the District Court of the United States for the District of Arizona, sitting at Phoenix in said District, in a suit pending in said Court between Dan Veazey as plaintiff, and Ray Consolidated Copper Company, a corporation, as defendant, cause No. 163 on the law docket of said Court, final judgment was rendered against the said Ray Consolidated Copper Company,

41 a corporation, for the sum of \$3,000.00 and costs, together with interest as provided by law, and the said Ray Consolidated Copper Company, a corporation, has obtained a

Writ of Error and filed a copy thereof in the Clerk's office of the said Court to reverse the judgment of the said Court in the aforesaid suit, and a Citation directed to the said Dan Veazey, defendant in error, citing him to be and appear before the Supreme Court of the United States, at Washington, D. C., according to law within sixty (60) days from the date thereof.

Now the condition of the above obligation is such that if the said Ray Consolidated Copper Company shall prosecute its Writ of Error to effect and answer all damages and costs if it fails to make its plea

good, then the above obligation to be void, else to remain in full force and virtue.

In witness whereof, the Ray Consolidated Copper Company, has caused these presents to be executed by Chalmers, Kent & Stahl, its Attorneys, and the Hartford Accident and Indemnity Company, of Hartford, Connecticut, has caused these presents to be executed by Alexander B. Baker, its Attorney in Fact, and attested by Julian A. Ganz, its Attorney in Fact, this 9th day of June, A. D. 1917.

RAY CONSOLIDATED COPPER COMPANY,

By CHALMERS, KENT & STAHL,  
*Its Attorneys.*

HARTFORD ACCIDENT AND INDEMNITY COMPANY, HARTFORD, CONN.,

By ALEXANDER B. BAKER,  
*Attorney in Fact.*

[CORPORATE SEAL.]

Attest:

JULIAN A. GANZ,  
*Attorney in Fact.*

Approved this the 9th day of June, A. D. 1917.

WM. H. SAWTELLE, *Judge.*

42      Endorsements: "No. —. In the District Court of the United States, in and for the District of Arizona. Dan Veazey, Plaintiff (Defendant in Error) vs. Ray Consolidated Copper Company, a corporation, Defendant (Plaintiff in Error). Superseas Bond. Filed June 9th, 1917. Mose Drachman, Clerk."

43      *Citation.*

In the District Court of the United States in and for the District of Arizona.

#163.

DAN VEAZEY, Plaintiff (Defendant in Error),

vs.

RAY CONSOLIDATED COPPER COMPANY, a Corporation, Defendant  
(Plaintiff in Error).

The President of the United States to Dan Veazey and to Struckmeyer & Jenckes, your Attorneys, Greeting:

You are hereby cited and admonished to be and appear at a session of the Supreme Court of the United States, to be holden in

the City of Washington, D. C., within sixty (60) days from the date of this Writ, pursuant to a Writ of Error filed in the clerk's office of the District Court of the United States for the District of Arizona, wherein Ray Consolidated Copper Company is Plaintiff in Error and you are Defendant in Error, to show cause, if any there be, why the judgment in said Writ of Error should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward D. White, Chief Justice of the Supreme Court, this 9th day of June, A. D., 1917.

WM. H. SAWTELLE,  
*United States District Judge  
for the District of Arizona.*

Service of a copy of the within Citation is hereby admitted.  
Dated Phœnix, Arizona, this 9th day of June, A. D., 1917.

STRUCKMEYER & JENCKES,  
*Attorneys for Plaintiff  
(Defendant in Error).*

44 [Endorsed:] In the District Court of the United States in and for the District of Arizona. Dan Veazey, Plaintiff (Defendant in Error) vs. Ray Consolidated Copper Company, a corporation, Defendant (Plaintiff in Error). Citation. Service of copy of within acknowledged this — day of June, 1917. —, Attorney for Plaintiff (Defendant in Error). Filed June 9th, 1917. Mose Drachman, clerk.

45 *Stipulation for Præcipe for Transcript of Record.*

In the United States District Court for the District of Arizona.

No. 163 (Phœnix).

DAN VEAZEY, Plaintiff (Defendant in Error),

vs.

RAY CONSOLIDATED COPPER COMPANY, a Corporation, Defendant  
(Plaintiff in Error).

It is hereby stipulated by and between the plaintiff (defendant in error) in the above entitled cause, by his attorneys of record, and by the defendant (plaintiff in error) in the above entitled cause, by its attorneys of record, that the Clerk of the above named Court may prepare a transcript of the complete record in the above entitled cause, to be filed in the office of the Clerk of the Supreme Court of the United States at Washington, D. C., under the Writ of Error to be perfected to said Court in said cause, and shall only include in said transcript the following proceedings, pleadings, papers, records and files, to-wit:

1. Complaint of plaintiff, filed Oct. 28, 1916;
2. Answer and demurrer of defendant, filed November 17, 1916;
3. Minute entry and order of March 2, 1917, sustaining defendant's demurrer as to Paragraph III of plaintiff's complaint and overruling same as to remaining paragraphs thereof;
4. Amended Complaint of plaintiff, filed March 3, 1917;
5. Minute entry and order of April 2, 1917, of election of defendant to stand upon original demurrer and answer and overruling of demurrer;
- 46 6. Minute entries of proceedings in this cause under dates of April 5th, April 6th and April 7th, 1917, including Verdict of Jury filed under date of April 7, 1917, and minute entry of Judgment of April 7, 1917;
7. Subdivision "1" of defendant's requested instructions refused by Court and filed under date of April 17, 1917;
8. Minute entry of Order granting defendant until May 16, 1917, to prepare and serve Bill of Exceptions, made under date of April 16, 1917;
9. Petition and Stipulation for extension of time until May 21, 1917, to file Bill of Exceptions, filed May 10, 1917;
10. Minute order granting to defendant extension of time to prepare and serve Bill of Exceptions;
11. Bill of Exceptions, filed May 26, 1917;
12. Petition for Writ of Error, filed June 9, 1917;
13. Assignments of Error and Prayer for Reversal, filed June 9, 1917;
14. Stipulation acknowledging receipt of copy of papers on Writ of Error and waiving objection to form, filed June 9, 1917;
15. Order Granting Writ of Error, filed June 9, 1917;
16. Writ of Error, filed June 9, 1917;
17. Supersedeas Bond on Writ of Error, filed June 9, 1917;
18. Citation, filed June 9, 1917;
19. This Stipulation for præcipe for transcript; said transcript to be prepared as required by law and the rules of this Court, and the rules of the Supreme Court of the United States.
- 47 Dated this 20th day of July, 1917.

WILLIAM H. KING,  
CHALMERS, KENT & STAHL,  
*Attorneys for Defendant*  
(*Plaintiff in Error*).  
STRUCKMEYER & JENCKES,  
*Attorneys for Plaintiff*  
(*Defendant in Error*).

Endorsements: "No. 163 (Phoenix). In the United States District Court for the District of Arizona. Dan Veazey, Plaintiff (Defendant in Error) vs. Ray Consolidated Copper Company, Defendant (Plaintiff in Error). Stipulation for Præcipe for Transcript of Record. Filed Jul- 20 1917. Mose Drachman, Clerk. By R. E. L. Webb, Deputy. William H. King, Chalmers, Kent & Stahl, Attorneys for Defendant (Plaintiff in Error). Struckmeyer & Jenckes, Attorneys for Plaintiff (Defendant in Error)."

*Clerk's Certificate to Record.*

In the United States District Court for the District of Arizona.

No. 163 (Phoenix).

DAN VEAZEY, Plaintiff (Defendant in Error),

vs.

RAY CONSOLIDATED COPPER COMPANY, a Corporation, Defendant  
(Plaintiff in Error).

UNITED STATES OF AMERICA,

*District of Arizona, ss:*

I, Mose Drachman, Clerk of the United States District Court for the District of Arizona, do hereby certify the foregoing pages numbered 1 to 48 inclusive, to be and present a true, full, correct and complete copy of the Assignments of Error and such portions of the record and proceedings had in the above and foregoing entitled cause as are necessary to the hearing of said cause and as are stipulated to be included by counsel of record herein, as the same remain of record and on file in the office of the Clerk of said District Court, except that the original Writ of Error and Citation in Error are embraced therein at pages 37 and 43 respectively, all of which constitute a complete transcript of the record and the proceedings in the said cause on Writ of Error to the Supreme Court of the United States.

Witness my official signature and seal of said District Court at my office in the city of Phoenix, in said District, this the 20th day of July, A. D. 1917.

[Seal United States District Court, District of Arizona.]

MOSE DRACHMAN, *Clerk,*  
By R. E. L. WEBB,  
*Deputy Clerk.*

Endorsed on cover: File No. 26,070. Arizona D. C. U. S. Term No. 603. Ray Consolidated Copper Company, plaintiff in error, vs. Dan Veazey. Filed July 30th, 1917. File No. 26,070.



IN THE  
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

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**No. 603.**

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RAY CONSOLIDATED COPPER COMPANY,  
PLAINTIFF IN ERROR,

*vs.*

DAN VEAZEY, DEFENDANT IN ERROR.

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**MOTION TO ADVANCE.**

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Comes now the plaintiff in error in the above-entitled cause, and moves that said cause be advanced and be heard immediately following No. 162, Arizona Copper Company *vs.* Bray, at this term of court.

This motion is made for the reason that the question at issue in the above-entitled cause is identi-

cally the same as that involved in No. 162, Arizona Copper Company *vs.* Bray, to wit, the validity under the 14th Amendment of the Constitution of the United States, of Chapter 6, Title XIV, of the Revised Statutes of Arizona, 1913, Civil Code, known as the Employers' Liability Law, as shown by the assignments of error in both of said cases.

Counsel believe that it is greatly in the interest of clearness and a proper consideration of the constitutionality of the statute in question, that these cases be argued at the same time, and that such action will save time and labor both to the court and to counsel.

Respectfully submitted,

ALEX. BRITTON,  
EVANS BROWNE,  
F. W. CLEMENTS,

*Attorneys for Plaintiff in Error.*

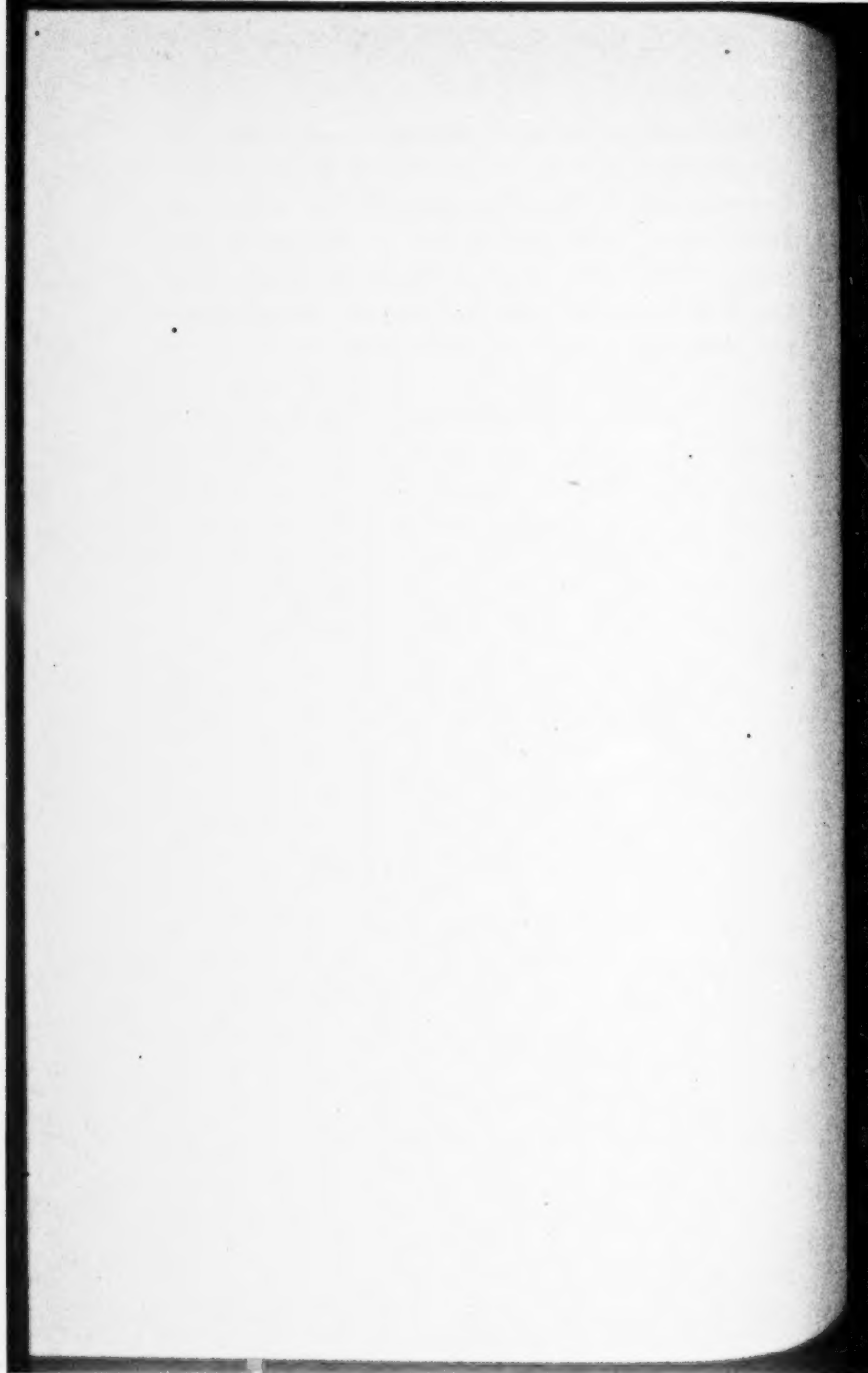
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The defendant in error hereby acknowledges service of a copy of the within motion, and for the reasons stated therein, joins in urging its allowance.

F. C. STRUCKMEYER,  
JOSEPH S. JENCKES,  
*Attorneys for Defendant in Error.*

[Endorsed:] No. 603. October Term, 1917. In the Supreme Court of the United States. Ray Consolidated Copper Co., Plaintiff in Error, *vs.* Dan Veazey, Defendant in Error. Motion to Advance. Chalmers, Kent & Stahl, Attorneys and Counsellors at Law, 205-208 Fleming Block, Phoenix, Arizona.

(35475)



Received copy of the within Brief of Plaintiff in Error  
this seventh day of November, 1917.

SERUCKMEYER & JENCCKES  
Attorneys for Defendant in Error

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### SPECIFICATIONS OF ERROR:

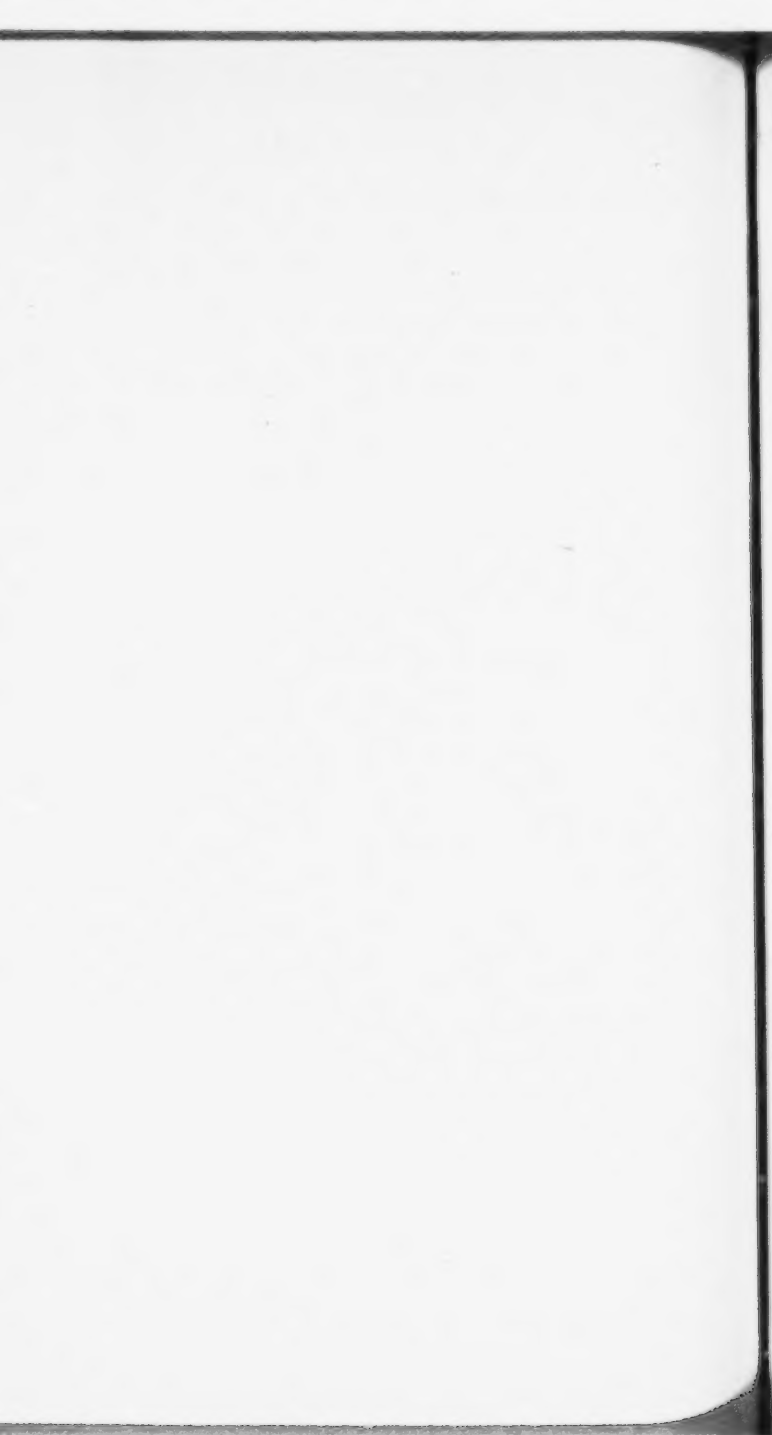
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# Supreme Court of the United States

OCTOBER TERM, 1917.

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RAY CONSOLIDATED COPPER  
COMPANY,

Plaintiff in Error,

vs.

DAN VEAZEY,

Defendant in Error.

No. 603

---

## STATEMENT OF THE CASE.

On the 20th day of October, A. D. 1916, the defendant in error, Dan Veazey, filed his complaint (T. R. p. 1) in the office of the Clerk of the District Court of the United States, in and for the District of Arizona, against the plaintiff in error, Ray Consolidated Copper Company, a corporation, alleging, in substance, that the plaintiff was a citizen of the State of Arizona, and that the defendant was a corporation organized and existing under and by virtue of the laws of the State of Maine; that on the 10th day of February, 1916, the said Veazey was employed by the Ray Consolidated Copper Company in and about a certain mill and reduction works as a millwright and carpenter in the construction of what was known as a "flotation system," and that on said day, while the said Veazey was exercising reasonable care for

his own safety, he suffered severe personal and bodily injuries by an accident arising out of and in the course of such labor, service and employment, and due to a condition or conditions of such occupation or employment, and that said injuries were sustained while the said Veazey was standing upon a certain timber or joist, engaged in bolting and fastening together the timbers of said flotation system, said timber or joist being elevated above the ground or floor a distance of approximately 10 feet; that while Veazey was so engaged in said employment, he slipped from said timber or joist and fell to the ground upon the floor of the mill, which floor was composed of concrete; that by reason of the force and violence with which plaintiff's body and limbs came in contact with the floor, he suffered severe personal and bodily injuries, and that plaintiff (defendant in error) had sustained damages by reason of said injuries in the sum of \$10,000. Said complaint also alleges that said action is brought under and by virtue of the provisions of Chapter 6, Title 14, Revised Statutes of the State of Arizona, 1913, Civil Code, relating to the liability of employers for injuries to workmen in hazardous occupations.

Thereafter, and on the 17th day of November, 1916, the defendant (plaintiff in error), Ray Consolidated Copper Company, filed its demurrer and answer to the complaint of the plaintiff (defendant in error), Veazey (T. R. p. 3), demurring, first, upon the ground that said complaint did not state facts sufficient to constitute a cause of action; and, second, demurring upon the ground that recovery is therein sought under and by virtue of Chapter 6, Title 14, Revised Statutes of Arizona, 1913, Civil Code, said Act being entitled, "Liability of Employers for Injuries to Workmen in Dangerous Occupations," and that said Act is unconstitutional and void, and con-

trary to and in violation of the Fourteenth Amendment to the Constitution of the United States in that said Act is an attempt to deprive the defendant (plaintiff in error) of its property without due process of law and denies to the defendant (plaintiff in error) the equal protection of the laws.

The answer, in the event that the demurrer should be overruled, admits the allegations of said complaint with respect to the citizenship of the plaintiff (defendant in error) and of the defendant (plaintiff in error), and also with reference to the business in which the defendant (plaintiff in error), Ray Consolidated Copper Company was then engaged; admits that the defendant, Veazey (plaintiff in error) met with an accident; and denies every other allegation of said complaint which is not specifically admitted. As an affirmative defense, said answer alleges that, if plaintiff (defendant in error) was injured as in said complaint alleged, it was by reason of his own carelessness and negligence which directly and proximately contributed to said injury; and that, if plaintiff (defendant in error) was injured as in said complaint alleged, it was by reason of certain dangers, risks and hazards then and there present and which had theretofore been and were then and there by him assumed. The answer also alleges, as an affirmative defense, that such action is brought under and by virtue of Chapter 6, Title 14, of the Revised Statutes of Arizona, 1913, Civil Code, and that said Act is unconstitutional for the reason that it is an attempt to impose upon the defendant (plaintiff in error), Ray Consolidated Copper Company, liability for injuries that may have been sustained by plaintiff (defendant in error) without fault or negligence on the part of the defendant (plaintiff in error), and is an attempt to deprive the defendant (plaintiff in error) of

its property without due process of law, and that it denies to the defendant (plaintiff in error) the equal protection of the laws.

Thereafter, and on the 3rd day of March, 1917, plaintiff Veazey (defendant in error) filed his amended complaint (T. R. p. 5), and the defendant (plaintiff in error), Ray Consolidated Copper Company, thereupon, in open court, elected to stand upon the demurrer and answer to plaintiff's original complaint as demurrer and answer to plaintiff's amended complaint, and said demurrer to plaintiff's amended complaint was overruled, to which defendant (plaintiff in error) duly excepted (T. R. p. 7).

Thereafter, and on April 5, 1917, the cause came on regularly for trial (T. R. p. 7). A jury was duly empaneled and sworn and accepted by both sides. Whereupon, before the statement of plaintiff's case to the jury had been made, and prior to the introduction of evidence, counsel for defendant (plaintiff in error) made objection (T. R. p. 8) to any statement of the case to the jury and to the introduction of any evidence on behalf of the plaintiff (defendant in error), on the ground that this act under which the action is brought is unconstitutional and in violation of the Fourteenth Amendment to the Constitution of the United States and that it would deprive the defendant (plaintiff in error) of its property without due process of law and would deny to the defendant (plaintiff in error) the equal protection of the law.

The objection was overruled by the court, and the defendant (plaintiff in error) duly excepted thereto (T. R. p. 8). Witnesses were sworn and testified on behalf of both parties (T. R. pp. 8 & 9), and the evidence being closed, argument of counsel was had, and requests in writing for instructions to the jury were made to the court by both parties (T. R. pp. 9 & 11).

Whereupon the case was submitted to the jury; and having retired and deliberated, the jury returned into court a verdict in behalf of the plaintiff (defendant in error), and against the defendant (plaintiff in error), assessing plaintiff's damages at the sum of Three Thousand Dollars (T. R. p. 10).

On the trial of said cause, it was shown that the plaintiff, Veazey (defendant in error), sustained certain injuries by reason of a fall from certain timbers while the said Veazey was in the employ of the Ray Consolidated Copper Company, and that such accident occurred by reason of a condition or conditions of the occupation of said plaintiff (defendant in error), and said accident was not due to the negligence of said plaintiff (defendant in error), or to the negligence of the defendant (plaintiff in error).

## SPECIFICATIONS OF ERROR.

### I.

The Court erred in overruling the Demurrer of the defendant (plaintiff in error) to the Amended Complaint filed in this cause, as follows:

"Demurs to said (Amended) Complaint upon the ground that same does not state facts sufficient to constitute a cause of action.

"Demurs to said (Amended) Complaint upon the ground that recovery is therein sought under and by virtue of Chapter 6, Title 14, Revised Statutes of Arizona, 1913, Civil Code, said Act being entitled: 'Liability of Employers for Injuries to Workmen in Dangerous Occupations,' and that said Act is unconstitutional and void and contrary to and in violation of the 14th Amendment to the Constitution of the United States in that said Act is an attempt to deprive this defendant of its property without due

process of law and denies to this defendant the equal protection of the laws."

## II.

The Court erred in overruling the first ground of Demurrer of the defendant (plaintiff in error) to the Amended Complaint of plaintiff (defendant in error) filed in this cause, which said Demurrer is upon the ground that said Amended Complaint does not state facts sufficient to constitute a cause of action, and in holding that said Amended Complaint does state a cause of action.

This specification is urged for the reason that said Amended Complaint shows on its face that recovery is therein sought under and by virtue of Chapter 6, Title 14, Revised Statutes of Arizona, 1913, entitled "An Act Providing for Liability of Employers for Injuries to Workmen in Dangerous Occupations," which said Act is unconstitutional and in violation of the 14th Amendment to the Constitution of the United States in that the Act imposes an unlimited liability upon employers and upon this defendant (plaintiff in error) without any fault on the part of such employers and of this defendant (plaintiff in error) and that said Act would deprive this defendant (plaintiff in error) of its property without due process of law and would deny to it the equal protection of the laws.

## III.

The Court erred in overruling the second ground of Demurrer of the defendant (plaintiff in error) to the Amended Complaint of the plaintiff (defendant in error) filed in this cause, as follows:

"Demurs to said (Amended) Complaint upon the ground that recovery is therein sought under and

by virtue of Chapter 6, Title 14, Revised Statutes of Arizona, 1913, Civil Code, said Act being entitled: 'Liability of Employers for Injuries to Workmen in Dangerous Occupations,' and that said Act is unconstitutional and void and contrary to and in violation of the 14th Amendment to the Constitution of the United States in that said Act is an attempt to deprive this defendant of its property without due process of law, and denies to this defendant the equal protection of the laws."

This specification is urged for the reason that said Act is unconstitutional and void and contrary to and in violation of the 14th Amendment to the Constitution of the United States and would deprive this defendant (plaintiff in error) of its property without due process of law, and would deny to this defendant (plaintiff in error) the equal protection of the laws as fully set forth in said ground of Demurrer, in that it imposes upon employers and upon this defendant (plaintiff in error) herein unlimited liability for injuries sustained by employees without fault or negligence on the part of such employers and of this defendant (plaintiff in error).

#### IV.

The Court erred in not sustaining the objection of the defendant (plaintiff in error) to the making of any statement to the jury on behalf of the plaintiff (defendant in error) and to the introduction of any evidence on behalf of the plaintiff (defendant in error) which objection, in which is stated the grounds thereof, is as follows, to-wit:

"We object to any statement of the plaintiff or the introduction of any evidence in this case, on the ground that this action is brought under the pro-

visions of what is known as the Employers' Liability Act, which is Chapter 6, Title 14, of the Revised Statutes of Arizona, 1913, entitled 'An Act Providing for Liability of Employers for Injuries to Workmen in Dangerous Occupations,' on the ground that this Act under which the action is brought is unconstitutional and in violation of the Fourteenth Amendment to the Constitution of the United States, in that the act imposes an unlimited liability upon employers and upon this defendant without any fault on its part and that the Act violates the Fourteenth Amendment to the Constitution of the United States and that it will deprive the defendant of its property without due process of law and would deny to the defendant the equal protection of the law, and that the Amended Complaint brought under this Act does not state facts sufficient to constitute a cause of action, for the reason that the Act under which the Amended Complaint is brought is unconstitutional."

#### V.

The Court erred in overruling and denying the motion and request of the defendant (plaintiff in error) to instruct the jury to return a verdict in favor of the defendant (plaintiff in error) and against the plaintiff (defendant in error) after the introduction of all testimony in the case, and upon the defendant (plaintiff in error) resting its case, which motion and request is as follows and made upon the grounds therein stated, to-wit:

"Comes now the defendant in the above entitled cause and hereby moves the Court to charge the jury as set forth in its request Number 1 and bases its said motion to so charge as set forth in said re-



quest Number 1 upon the grounds set forth immediately following said request.

Number 1.

The jury is hereby instructed and directed to render a verdict in favor of the defendant and against the plaintiff herein.

The foregoing motion to direct the jury to render a verdict in favor of the defendant and against plaintiff is made and based upon the following grounds.

(a) That the cause of action in the Amended Complaint of the plaintiff upon which he is now relying, is expressly based upon and recovery is therein expressly sought under the provisions of Chapter 6, Title 14, Revised Statutes of Arizona, 1913, Civil Code, said Act being entitled: 'Liability of Employers for Injuries to Workmen in Dangerous Occupations.' That said Act is unconstitutional and void and plaintiff is entitled to no recovery or relief thereunder for the reason that said Act imposes upon this defendant unlimited liability for injury or injuries sustained by plaintiff without fault or negligence on the part of this defendant, and said Act is contrary to and in violation of the Fourteenth Amendment to the Constitution of the United States in that it deprives this defendant of its property without due process of law and denies to this defendant the equal protection of the laws."

ARGUMENT.

An inspection of these Specifications of Error will show that the first ground of demurrer to the complaint, the second ground of demurrer to the complaint, the objection to the making of any statement to the jury and

to the introduction of evidence on behalf of the plaintiff (defendant in error), and the exception to the ruling of the Court in denying the motion and request of the defendant (plaintiff in error) to instruct the jury to return a verdict in favor of the defendant (plaintiff in error), are all based upon the one objection that the so-called "Employers' Liability Law" of the State of Arizona, to-wit, Chapter 6, Title 14 of the Revised Statutes of Arizona, 1913, Civil Code, is unconstitutional and void; and the sole question at issue herein, and called to the attention of the court, is as to whether or not the provisions of Chapter 6, Title 14, Revised Statutes of Arizona, 1913, Civil Code, entitled "Liability of Employers for Injuries to Workmen in Dangerous Occupations," are unconstitutional and void and contrary to and in violation of the Fourteenth Amendment to the Constitution of the United States, in that said Act is an attempt to deprive defendant (plaintiff in error) of its property without due process of law and denies to the defendant (plaintiff in error) the equal protection of the laws.

Section 7 of Article XVIII of the Constitution of the State of Arizona provides as follows:

"To protect the safety of employees in all hazardous occupations, in mining, smelting, manufacturing, railroad or street railway transportation, or any other industry the Legislature shall enact an Employer's Liability Law, by the terms of which any employer, whether individual, association, or corporation shall be liable for the death or injury, caused by any accident due to a condition or conditions of such occupation, of any employee in the service of such employer in such hazardous occupation, in all cases in which such death or injury of

such employee shall not have been caused by the negligence of the employee killed or injured."

Chapter 6 of Title 14, Civil Code of Arizona, 1913, was enacted in obedience to the mandate contained in Section 7 of Article XVIII of the Constitution of the State of Arizona, and is as follows:

"TITLE 14.

"CHAPTER VI.

*"Liability of Employers for Injuries to Workmen in Dangerous Occupations.*

"3153. This chapter is and shall be declared to be an employers' liability law as prescribed in Section 7 of Article XVIII of the State Constitution:

"3154. That to protect the safety of employees in all hazardous occupations in mining, smelting, manufacturing, railroad, or street railway transportation, or any other industry, as provided in said Section 7 of Article XVIII of the State Constitution, any employer, whether individual, association, or corporation, shall be liable for the death or injury, caused by any accident due to a condition or conditions of such occupation, of any employee in the service of such employer in such hazardous occupation, in all cases in which such death or injury of such employee shall not have been caused by the negligence of the employee killed or injured.

"3155. The labor and services of workmen at manual and mechanical labor, in the employment of any person, firm, association, company, or corporation, in the occupations enumerated in the next section hereof, are hereby declared and determined to be service in a hazardous occupation within the

meaning of the terms of the preceding section.

By reason of the nature and conditions of, and the means used and provided for doing the work in, said occupations, such service is especially dangerous and hazardous to the workmen therein, because of risks and hazards which are inherent in such occupations and which are unavoidable by the workmen therein.

"3156. The occupations hereby declared and determined to be hazardous within the meaning of this chapter as follows:

(1) The operation of steam railroads, electrical railroads, street railroads, by locomotives, engines, trains, motors, or cars of any kind propelled by steam, electricity, cable or other mechanical power, including the construction, use or repair of machinery, plants, tracks, switches, bridges, roadbeds, upon, over and by which such railway business is operated.

(2) All work when making, using or necessitating dangerous proximity to gunpowder, blasting powder, dynamite, compressed air, or any other explosive.

(3) The erection or demolition of any bridge, building or structure in which there is, or in which the plans and specifications require, iron or steel frame work.

(4) The operation of all elevators, elevating machines or derricks or hoisting apparatus used within or on the outside of any bridge, building or other structure for conveying materials in connection with the erection or demolition of such bridge, building or structure.

(5) All work on ladders or scaffolds of any kind

elevated twenty feet or more above the ground or floor beneath in the erection, construction, repair, painting or alteration of any building, bridge, structure or other work in which the same are used.

(6) All work of construction, operation, alteration or repair where wires, cables, switchboards, or other apparatus or machinery are in use charged with electrical current.

(7) All work in the construction, alteration, or repair of pole lines for telegraph, telephone or other purposes.

(8) All work in or about quarries, open pits, open cuts, mines, ore reduction works and smelters.

(9) All work in the construction and repair of tunnels, subways and viaducts.

(10) All work in mills, shops, works, yards, plants and factories where steam, electricity, or any other mechanical power is used to operate machinery and appliances in and about such premises.

"3157. Every employer, whether individual, firm, association, company or corporation, employing workmen in such occupation, of itself or through an agent, shall by rules, regulations or instructions, inform all employees in such occupations as to the duties and restrictions of their employment, to the end of protecting the safety of employees in such employment.

"3158. When in the course of work in any of the employments or occupations enumerated in the preceding section, personal injury or death by any accident arising out of and in the course of such labor, service and employment, and due to a condition or conditions of such occupation or employment, is caused to or suffered by any workman engaged

therein, in all cases in which such injury or death of such employee shall not have been caused by the negligence of the employee killed or injured, then the employer of such employee shall be liable in damages to the employee injured, or, in case death ensues, to the personal representative of the deceased for the benefit of the surviving widow or husband and children of such employee; and, if none, then to such employee's parents; and, if none, then to the next of kin dependent upon such employee, and if none, then to his personal representative, for the benefit of the estate of the deceased.

"3159. In all actions hereafter brought against any such employer under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to any employee, or where such injuries have resulted in his death, the question whether the employee may have been guilty of contributory negligence, or has assumed the risk, shall be a question of fact and shall at all times, regardless of the state of the evidence relating thereto, be left to the jury, as provided in Section 5 of Article XVIII of the State Constitution; provided, however, that in all actions brought against any employer, under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee.

"3160. That any contract, rule, regulation or device whatsoever, the purpose or intent of which shall

be to enable any employer to exempt himself or itself from any liability created by this chapter, shall to that extent be void; provided, that in any action brought against any such employer under or by virtue of any of the provisions of this chapter, such employer may set off therein any sum it has contributed or paid to any insurance, relief, benefit or indemnity or that it may have paid to the injured employee or his personal representative on account of the injury or death for which said action was brought.

"3161. In all actions for damages brought under the provisions of this chapter, if the plaintiff be successful in obtaining judgment, and if the defendant appeals to a higher court, and if the plaintiff in the lower court be again successful; and the judgment of the lower court is sustained by the higher court or courts; then, and in that event, the plaintiff shall have added to the amount of such judgment by such higher court or courts, interest at the rate of twelve per cent per annum on the amount of such judgment from the date of the filing of the suit in the first instance until the full amount of such judgment is paid.

"3162. No action shall be maintained under this chapter unless commenced within two years from the day the cause of action accrued."

## EMPLOYERS' LIABILITY ACT IS COMPENSATION ACT

The meaning of this last named Act is simply stated in Paragraph 3158; and is, that when an employe is injured or killed in the course of his employment, and which injury or death shall be due to a condition or conditions

of such occupation and shall not be caused by his own negligence, then he, or in case of his death his personal representatives, shall have a cause of action for *unlimited damages* against his employer, regardless of whether or not such action is caused by the negligence of the employer.

The provision for *unlimited damages* in this Act is a provision heretofore unknown to all compensation laws, so far as we can determine.

The Federal Employers' Liability Act, while it abolishes certain common law defenses, is predicated and gives a right of action upon the fact that there must be negligence on the part of the employer; and in the sense generally used in all acts providing for unlimited liability, such liability for damages is based upon tort.

Notes under L. R. A. (1915C), p. 54, Seaboard A. L. R. Co. v. Horton.

In the Arizona Employers' Liability Law (paragraph 3158), it is provided that

"the employer of such employe shall be liable in *damages* to the employe injured."

There are two kinds of damages known to the law: compensatory damages and punitive damages. Compensatory damages are such as make the wrong to be whole as of the time of the injury, and mean compensation for the loss incurred or the injury sustained in a given case.

Myhra v. Chicago, M. & P. S. Ry., 112 Pac. 939

Punitive damages exist where the tortious act is aggravated by evil motive, malice, violence, oppression or fraud.

James McNeil & Bro. Co. v. Crucible Steel Co. of America, 56 Atl. 1067-1071.

A careful reading of the Arizona statute seems to



show that it was the intention of the Legislature to award damages of a compensatory nature, and not of a punitive nature, for the right of action is given in the entire absence of negligence, malice, fraud, etc., on the part of the employer. We can therefore rightfully assume that the Employers' Liability Act of Arizona is purely in the nature of a compensation act, with the amount of such compensation entirely unlimited.

Liability at common law is based upon tort. The departure in comparatively recent legislation of the various states by the enactment of workmen's compensation acts, from the common law principle, has been due to the necessity of providing protection for working men engaged in hazardous occupations, in case of accident arising from the conditions of such occupations, but in every such case the Legislature has regulated such liability.

This Court has held that it is within the power of the Legislature of the state to create liability on the part of employers, even though the same shall only be implied from the fact that an employe may be engaged in a hazardous occupation (*N. Y. Cent. RR. Co. v. White*, 243 U. S. 188).

In every other state, except the State of Arizona, where a new right of action of this character has been created, and which is strictly in derogation of the common law, the enactment in which such right of action has been given is termed a "Compensation Law," and any award provided for, to an employe injured in the course of his employment, without his fault and due to the surroundings or conditions of his occupation, has been called "compensation"; and the manner of computing such compensation and the amount to be awarded such employe has been based upon a plan which includes the taking into consideration of wages and earning capacity of such

employee, the duration of the disability occasioned by the accident, or in case of death, by a flat amount based upon the ascertaining of a fixed period of earning capacity.

In consideration of this particular question as affecting the Employers' Liability Law, it must also be recognized that the framers of the Constitution of the State of Arizona made provision for the enactment of what is termed a "Workmen's Compensation Act," in Section 8 of Article XVIII, as follows:

"The Legislature shall enact a Workmen's Compulsory Compensation law applicable to workmen engaged in manual or mechanical labor in such employments as the Legislature may determine to be especially dangerous, by which compulsory compensation shall be required to be paid to any such workman by his employer, if in the course of such employment personal injury to any such workman from any accident arising out of, and in the course of, such employment is caused in whole, or in part, or is contributed to, by a necessary risk or danger of such employment, or a necessary risk or danger inherent in the nature thereof, or by failure of such employer, or any of his or its officers, agents, or employee, or employees, to exercise due care, or to comply with any law affecting such employment; Provided, that it shall be optional with said employee to settle for such compensation, or retain the right to sue said employer as provided by this Constitution."

In pursuance of this Constitutional mandate, Chapter VII of Title 14 of the Revised Statutes of Arizona, Civil Code, 1913, was enacted, as follows:

#### "CHAPTER VII.

*"Compensation for Injuries to Workmen Engaged in Dangerous and Hazardous Employment.*

"3163. This Chapter is a Workman's Compulsory Compensation law as provided in Sec. 8 of Article XVIII of the State Constitution.

"3164. Compulsory compensation shall be paid by his employer to any workman engaged in any employment declared and determined as in the next section hereof (as provided in Sec. 8 of Article XVIII of the State Constitution) to be especially dangerous, whether said employer be a person, firm, association, company, or corporation, if in the course of the employment of said employee personal injury thereto from any accident arising out of, and in the course of, such employment is caused in whole, or in part, or is contributed to, by a necessary risk or danger of such employment, or a necessary risk or danger of such employment, or a necessary risk or danger of such employment, or any of his or its officers, agents, or employee or employees, to exercise due care, or to comply with any law affecting such employment.

"3165. The employments hereby declared and determined to be especially dangerous (as provided in Sec. 8 of Article XVIII of the State Constitution) within the meaning of this Chapter are as follows:

(1.) The operation of steam railroads, electrical railroads, street railroads, by locomotives, engines, trains, motors, or cars of any kind propelled by a steam, electricity, cable or other mechanical power, including the construction, use or repair of machinery, plants, tracks, switches, bridges, roadbeds, upon, over, and by which such railway business is operated.

(2.) All work when making, using or necessi-

tating dangerous proximity to gunpowder, blasting powder, dynamite, compressed air, or any other explosive.

(3.) The erection or demolition of any bridge, building, or structure in which there is, or in which the plans and specifications require, iron or steel framework.

(4.) The operation of all elevators, elevating machinery or derricks or hoisting apparatus used within or on the outside of any bridge, building or other structure for conveying materials in connection with the erection or demolition of such bridge, building or structure.

(5.) All work on ladders or scaffolds of any kind elevated twenty feet or more above the ground or floor beneath in the erection, construction, repair, painting or alteration of any building, bridge, structure or other work in which the same are used.

(6.) All work of construction, operation, alteration or repair where wires, cables, switchboards, or other apparatus or machinery are in use charged with electrical current.

(7.) All work in the construction, alteration or repair of pole lines for telegram, telephone or other purposes.

(8.) All work in mines; and all work in quarries.

(9.) All work in the construction and repair of tunnels, subways and viaducts.

(10.) All work in mills, shops, works, yards, plants, and factories where steam, electricity, or any other mechanical power is used to operate machinery and appliances in and about such premises.

"3166. In case such employee or his personal representative shall refuse to settle for such com-

pensation (as provided in Sec. 8 of Article XVIII of the State Constitution) and chooses to retain the right to sue said employer (as provided in any law provided for in Sec. 7, Article XVIII of the State Constitution) he may so refuse to settle and may retain said right.

"3167. It is hereby declared and determined to be contrary to public policy that any employer conducting any especially dangerous industry, through any of his or its officers, agents, or employee or employees, shall fail to exercise due care, or fail to comply with any law affecting such employment, in such manner as to endanger the lives and safety of employees thereof, without assuming the burden of the financial loss through disability entailed upon such employees, or their dependents, through such failure; and it is further declared and determined to be contrary to public policy that the burden of the financial loss to employees in such dangerous employments, or to their dependents, due to injuries to such employees received through such accidents as are hereinbefore mentioned shall be borne by said employees without due compensation paid to said employees, or their dependents, by the employer conducting such employment, owing to the inability of said employees to secure employment in said employments under free contract as to the conditions under which they will work.

"3168. The common law doctrine of no liability without fault is hereby declared and determined to be abrogated in Arizona as far as it shall be sought to be applied to the accidents hereinbefore mentioned.

"3169. When, in the course of work in any of

the employments described in the third section above, personal injury by accident arising out of and in the course of such labor, service, or employment, is caused to or suffered by any workman engaged therein, by any risk or failure specified in Section 66 (Par. 3164) hereof, then such employer shall be liable to and must make and pay compensation to the workman injured, and his personal representative, when death ensues, for the benefit of the estate of the deceased, for such injury at the rates and in the manner hereinafter set out in this Chapter;

Provided, that the employer shall not be liable under this Chapter in respect of any injury which does not disable the workman for a period of at least two weeks after the date of the accident from earning full wages at the work at which he was employed, at the time of the injury; and provided, further, that the employer shall not be liable under this Chapter in case the employee refuses to settle for such compensation and retains his right to sue as provided in Section 68 (Par. 3166) of this Title.

"3170. When an injury is received by a workman engaged in any labor or service specified in Section 67 (Par. 3165) of this Title, and for which the employer is made liable as specified in Section 71 (Par. 3169) hereof, then the measure and amount of compensation to be made by the employer to such workman or his personal representative for such injuries, shall be as follows:

(1.) If the injury by accident does not result in death within six months from the date of the accident, but does produce or result in total incapacity of the workman for work at any gainful employment for more than two weeks after the accident, then the

compensation to be made to such workman by his employer shall be a semi-monthly payment commencing from the date of the accident and continuing during such total incapacity, of a sum equal to fifty per centum of the workman's average semi-monthly earnings when at work on full time during the preceding year, if he shall have been in the employment of such employer for such length of time; but if not for a full year, then fifty per centum of the average wages, whether semi-monthly, weekly, or daily, being earned by such workman during the time he was at work for his employer before and at the time of the accident.

(2) In case (1) the accident does not wholly incapacitate the workman from the same or other gainful employment; or (2) in case the workman, being at first wholly incapacitated, thereafter recovers so as to be able to engage at labor in the same or other gainful employment, thereby earning wages, then in each case the amount of the semi-monthly payment shall be one-half of the difference between the average earnings of the workman at the time of the accident determined as above provided, and the average amount he is earning, or is capable of earning, thereafter, semi-monthly in the same or other employment—it being the intent and purpose of this Chapter, that the semi-monthly payments shall not exceed, but equal, from time to time, one-half the difference between the amount of average earnings ascertained as aforesaid at the time of the accident, and the average amount which the workman is earning, or is capable of earning, in the same or other employment or otherwise, after the accident and at the time of such semi-monthly pay-

ment. Such payments shall cease upon the workman recovering and earning, or being capable of earning, in the same or other gainful employment or otherwise, wages equal to the amount being earned at the time of the accident;

Provided, however that the payments shall continue to be made as herein determined to the workman so long as incapacity to earn wages in the same or other employment continues, but in no case shall the total amount of such payments as provided in sub-sections 1 and 2 of this section exceed four thousand dollars.

(3.) When the death of the workman results from the accident within six months thereafter, and the workman, at the time of his death, leaves a widow, and a minor child or children, dependent on such workman's earnings for support and education, then the employer shall pay to the personal representative of the deceased workman for the exclusive benefit of such widow and child, or children, a sum equal to twenty-four hundred times one-half the daily wages or earnings of the decedent, determined as aforesaid, but in no event more than the sum of four thousand dollars. Such sum shall be paid in lump and held in trust by such representative for such widow and children and applied by him to the support of the widow while she remains unmarried, and to the support and education of the children so long as necessary, and until eighteen years of age, in such way and manner as to him shall seem best and just, under and in accordance with the directions of the court having jurisdiction of the estate of the decedent; any balance remaining unapplied at the closing of the estate of the decedent shall be dis-



tributed to the decedent's widow (if still his widow), and the children or next of kin, as provided by the law of descents. The personal representative may pay out of said fund the reasonable and necessary expenses of medical attendance and burial of the decedent. If the workman leaves no widow or child, or children, but a father or mother or sister dependent on him for support, then said sum shall be for their benefit to be applied as above provided. If the deceased workman leaves no widow, children, or other dependents, then the employer shall pay the reasonable expenses of medical attendance upon the decedent and also provide and secure his burial in a proper cemetery, which may be chosen by the friends of the decedent.

- "3171. Any workman claiming compensation under the provisions of this Chapter shall, if requested by the employer, or upon written notice by him given to the employer, submit himself for bodily examination by some competent licensed medical practitioner or surgeon of the county in which the workman then resides, to ascertain and determine the nature, character, extent, and effect of the injury to such workman at the time of such examination for the purpose of ascertaining the semi-monthly compensation then and thereafter to be made. The employer or the workman not having requested the examination may have present at the examination a medical representative by him chosen. Each party
- shall pay his chosen representative the expenses of such examination. The said notice shall be given at least ten days before the date fixed for the examination, and the place shall be convenient for the workman to be examined. In case the employer is a cor-

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poration, the notice may be served on any officer or agent thereof in the said county, and if none there, then elsewhere in the state. The examiner shall make a verified report in writing in duplicate within ten days after the examination and furnish one copy to the employer and one to the workman. If any workman neglects or refuses to submit to an examination, his right to compensation, if any, shall be suspended until he notifies the employer in writing of his readiness to submit thereto. No persons other than the physicians and surgeons aforesaid shall attend any examination except by agreement of the parties. If the employer and the workman each have an examiner, and they shall agree upon and join in a report, the same shall be conclusive so long as it remains in force. If either the employer or the employee, having opportunity, fails to provide an examiner, then the report of the examiner making such examination shall likewise be conclusive so long as the same remains in force. If the workman and the employer each have an examiner present, and they disagree as to the nature, character, extent, or effect of the injury, and the degree of incapacity, if any, for labor on the part of the workman at the time of such examination, then they shall join in a written report stating the matters in which they agree, and in which they disagree, and mutually select some disinterested medical practitioner or surgeon of the county to whom the same shall be referred, and who shall proceed promptly to make an examination of the workman as to the matters in disagreement, and the same shall be conclusive so long as such report remains in force, which report shall be made by such disinterested ex-

aminer and verified, and a copy thereof furnished to the employer and the workman. For making such examination, such examiner shall be entitled to a fee of ten dollars, to be paid one-half by the employer and one-half by the workman at the time of such examination. Such examination may be required by the workman or the employer at periods not shorter than three months from the date of the last examination. The report of any examination shall supersede all previous reports. When there is disagreement between the examiners aforesaid, and they cannot agree upon a third person as above provided, then it shall be the duty of the chairman of the board of supervisors of the county, on written notice of either the workman or employer, to appoint some licensed medical practitioner or surgeon, who shall be a resident of the county, to make such examination, and said appointee shall be entitled to the same compensation.

"3172. Every workman seeking compensation under the provisions of this chapter, where the same is not fatal or does not render him incompetent to give the notice, shall, within two weeks after the day of the accident, give notice in writing to the employer, or his representative employing such workman, or to the foreman or other employee of the employer under whom he was working at the time of the accident, and before the workman has voluntarily left the service of the employer and during his disability. The notice shall state (1) the name and address of such workman, (2) the date and place of the accident, (3) and state in simple words the cause thereof, (4) the nature and degree of the injury sustained, (5) and that compensation is claim-

ed under this Chapter. The notice may be written and served personally by the workman or by any one in his behalf on any person named above in this section, or by mail, postpaid, to such person, addressed to the office, place of business or residence of the person notified. No want or defect or inaccuracy of the notice shall be a bar to the right of the workman to claim and receive compensation under this chapter, or to maintain any proceeding to secure the same, unless the employer proves that he has been seriously prejudiced by such lack of notice. No compensation shall be claimed or allowed so long as such notice is not given. If the workman is killed, or otherwise rendered incompetent to give the notice, the same is not hereby required, nor is any notice required to be given by the personal representative of such deceased person. It shall be the duty of any one giving a notice as in this section provided, to mail a duplicate copy to the attorney general of this state.

“3173. Any question which may arise between the employer and the workman or his personal representative, under this chapter, shall be determined either (1) by written agreement between the parties, or (2) by arbitration, or (3) by reference and submission to the attorney general of this state; and in case of a refusal or failure of the employer and workman, or such personal representative, to agree upon a settlement by either of the modes above provided, then by a civil action at law, showing such refusal or failure as a reason for suit. If any employer fails to make and pay compensation, as in this chapter provided, for a period of three months after the date of the accident, or for any two months

or more after payment of the last monthly compensation, then the injured workman, if surviving, or the personal representative, in case of death, may bring an action in any court of competent jurisdiction to recover and enforce the compensation herein provided. Such action shall be conducted as near as may be in the same manner as other civil actions at law. The action shall be brought within one year after the happening of the accident, or after the non-payment of any semi-monthly installment theretofore fixed by agreement or otherwise; or within one year after the appointment of a personal representative of the decedent. The judgment in such action, when in favor of the plaintiff, shall be for a sum equal to the amount of payments then due and prospectively due under the provisions of this chapter. The judgment shall be for the total amount thereof and collectible without relief from valuation or appraisement laws. And the court awarding the judgment shall, by proper order, direct that the same shall be paid ratably to the workman, if living, in semi-monthly installments until the determination of the periods provided in this chapter the same as if such payments were being made voluntarily or without suit in conformity with this chapter. The judgment, by agreement, if it appears to the court to be for the best interests of the workman, may be paid in lump and not otherwise. The court rendering the judgment is hereby given power from time to time to make such orders touching the matter of payments as may appear best to provide for the maintenance and support of the workman and his family during his infirmity, and for his and their benefit and security. The employer shall have the

right to stay the judgment in whole, whether the same is to be paid in lump sum or monthly installments, upon securing the same by one or more freehold sureties or a surety company, to be approved by the court rendering the judgment, who shall enter into a recognizance acknowledging themselves bound for the defendant for the payment of the judgment in lump or in partial payments as the same is, or shall be made, payable, together with interest and costs. On failure of any one or more of such payments by the employer, execution may issue out of said court and cause, against such defendant, and his bail from time to time, leviable and collectible without relief from valuation or appraisement or stay laws. The recognizance shall be written upon the order book of the court and immediately following the entry of the judgment and signed by such bail and docketed in the judgment docket of the court against such defendant and bailors, which shall bind the property of the same in the same manner as the judgment binds the property of the employer. In an action by a personal representative of a deceased workman, the court shall determine the proportions of the judgment, whether in lump or in installments, to be distributed between the widow and child, or children, with power to alter and amend the apportionment from time to time on petition of any party interested as the court may deem best for the support, maintenance, and education of such widow and children.

In any action under this chapter the court shall fix and allow, at the time of entering the judgment against the employer, a reasonable fee to the workman's attorney, to be taxed against the employer as

costs, and collectible in the same manner. From such allowance there shall be no right of appeal. Such attorney shall have no claim for compensation upon the judgment or its proceeds, other than as herein provided. But no allowance, or any fee payable by the workman to an attorney for services, or any fee payable by the workman to an attorney for services in securing a recovery or disbursement, shall ever exceed twenty-five per centum of the principal of the sum recovered; and the same shall not be made a lien on the recovery or its proceeds, except as may be determined and allowed and fixed by the court.

"3174. Any workman entitled to monthly or other payments from or to any judgment against any employer as above provided, as compensation, shall have the same preferential claim therefor against the property and assets of the employer and any bailor as now is allowed by law for unpaid wages for personal services. No judgment or any part thereof, nor monthly payments due, or coming due, under this chapter shall be assignable by the workman or subject to mortgage, levy, execution, or attachment. But the same shall stand as a continuing provision for the maintenance and support of such injured workman during his incapacity for the periods provided in this chapter.

"3175. In case an injured workman, having a right of action under the provisions of this chapter, shall be mentally incompetent at the time when any right or privilege accrues thereunder to him, a guardian may be appointed by any court having jurisdiction, to secure and protect the rights of such workman; and the guardian may claim and exer-

cise any and all of such rights or privileges with the same force and effect as if the workman himself had been competent and had claimed or exercised any such right or privilege; and no limitation of time provided in any of the foregoing sections shall run so long as said incompetent workman has no guardian.

"3176. This chapter shall be construed as a continuation of the law contained in Chapter XIV of the laws of the First Legislature of the State of Arizona, Second Session. All workmen employed by an employer at manual and mechanical labor of the kinds defined in Section 67 (Par. 3165) of this chapter shall be deemed and held in law to be employed and working subject to the provisions of this chapter, and the employer and the workman shall alike be bound by and shall have each and every benefit and right given in this chapter the same as if a mutual contract to that effect were entered into between the employer and the workman at any time before the happening of any accident. It shall be lawful, however, for the employer and workman to disaffirm an employment under the provisions of this chapter by written contract between them or by written notice by one to and served upon the other to that effect before the day of the accident;

Provided, such written contract does not provide for less compensation than as provided in this chapter. And in the absence of such written contract or written notice, served as above provided, it shall be taken and held that the employment and service is under this chapter; and the same shall be the sole measure of their respective rights and liabilities when and as provided in this chapter;



Provided, if, after the accident, either the employer or the workman shall refuse to make or accept compensation under this chapter or to proceed under or rely upon the provisions hereof for relief, then the other may pursue his remedy or make his defense under other existing statutes, the State Constitution, or the common law, except as herein provided, as his rights may at the time exist. Any suit brought by the workman for a recovery shall be held as an election to pursue such remedy exclusively.

"3177. Any employer employing workmen to perform labor or services of other kinds than as defined in this chapter, and such workmen and employees may, by agreement, at any time during the employment, accept and adopt the provisions of this chapter as to liability for accident, compensation, and the methods and means of paying and securing and enforcing the same. And in every such case the provisions of this chapter shall be taken in law and fact to bind the parties as fully as if they were specifically mentioned and embraced in the provisions of this chapter.

"3178. This chapter is remedial in its purpose and shall be construed and applied so as to secure promptly and without burdensome expense to the workman the compensation herein provided and apportioned so as to provide support during the periods named for the loss of ability to earn full wages.

"3179. Nothing in this chapter shall be deemed or taken to repeal or affect in any way any other acts or laws passed by the first legislature of the State of Arizona, and in so far as refers to the same

subject in other acts it shall be deemed to be cumulative only."

Under this Act, the employer is liable to his employe whenever injury results from any accident arising out of or in the course of such employment, when such injury "is caused in whole or in part or is contributed to by a necessary risk or danger of such employment or a necessary risk or danger inherent in the nature thereof, or by failure of such employer, or any of his or its officers, agents, employe or employes, to exercise due care or to comply with any law affecting such employment."

In other words, the only distinction between the Employers' Liability Law and the Workmen's Compensation Act is that, in the former, the employe cannot recover if the accident is caused by his own negligence; whereas, in the latter, he can recover if the accident is *contributed to* by a necessary risk or danger of such employment.

In analyzing the reason for liability in both of these Acts, we cannot discern any difference. Certainly, if an accident is caused by an employe's own negligence, it cannot be contributed to by the employer; and if it is caused by his own negligence, it cannot be due to any risk of the employment itself. Yet, in the Compensation Act, the liability is limited; and in the Employers' Liability Act, the liability is unlimited. So that the Legislature, in the enactment of the Compensation Act, has provided a system whereby such liability can be ascertained, and has provided bounds beyond which the amount of such liability cannot go; and then paradoxically has enacted the Employers' Liability Law, which disregards such limited remedy and plan for compensa-

tion, and renders the employer liable for an unlimited amount.

Thus, under the Compensation Act, the employe was given full protection and right under the statute enacted in pursuance of the Constitutional mandate, which was strictly in derogation of the common law, and the employer was given the protection of limited liability; and then, disregarding the principle established by the Compensation Act, the Legislature enacted the Employers' Liability Law, thus preserving every right of the employe, and destroying the protection afforded the employer (under the Workmen's Compensation Act) by subjecting such employer to unlimited liability.

If the new right of action, given under the provisions of the Employers' Liability Law, arises when there occurs an accidental injury, in which neither the employe nor the employer may be to blame, the liability should be measured and ascertained according to rules adopted by approved Compensation Acts; otherwise such liability cannot conform to due process of law, or such liability act cannot afford due protection of the laws.

N. Y. Central RR. Co. v. White, 243 U. S. 188, *supra*.

The Supreme Court of the State of Arizona has defined what avenues of redress are open to employes injured, or in case of death to their personal representatives, where such employes are injured or killed in the course of employment in a hazardous occupation; and has specifically set forth the three methods of redress, to-wit:

1.—To recover under the Workmen's Compensation Act;

2.—To recover under the Employers' Liability Law;

3.—To maintain an action at common law for damages.

And the court has further held that the employe, having once elected to pursue one of the three methods above described, must pursue exclusively the remedy under such election.

Arizona Smelting Co. v. Ujack, 15 Ariz. 382, 139 Pac. 465.

Section 4 of Article 18 of the Constitution of the State of Arizona provides as follows:

"The common law doctrine of fellow servant, so far as it affects the liability of the master for injuries to his servants resulting from the acts or omissions of any other servant or servants of the common master, is forever abrogated."

Section 5 of the same Article provides as follows:

"The defense of contributory negligence or of assumption of risk shall, in all cases whatsoever, be a question of fact and shall, at all times, be left to the jury."

In any event, the employer, or the master, is denied the defense of the negligence of a fellow servant, and is practically denied any defense as to contributory negligence or assumption of risk; and is denied these defenses whether or not the employe sues under the provisions of the Workmen's Compensation Act or under the Employers' Liability Law.

The theory of upholding compensation acts of the various states has been based upon the idea that they are substitutes, enacted by the Legislature in place of the common law employers' liability rule of damages for personal injury, in that the state owes the duty to its members of preventing their becoming public charges by reason of injuries sustained in the industries of mod-

ern civilization; and it is incumbent upon the state, as a duty, to stop the waste of time in protracted and bitterly contested law suits, and thereby remove one of the most potent causes of hatred and animosity between the employer and the employe; and that the state also has the obligation and duty to prevent unjust and bogus claims, supported and opposed by perjury and subornation of perjury, and to see that bona fide claims for injuries actually sustained in the course of the various employments, for compensation, are amicably and expeditiously settled, and that the injured employe, or his dependents in case of his death, receive not only a portion of the amount which may be rightfully due him under prescribed rules, but that all of such money shall be so received, and that none shall be dissipated in useless and unnecessary legal expenses.

Our Employers' Liability Law, being a special statute in derogation of the common law, cannot be construed in any way but in the light of a compensation act, and it must be judged and determined in accordance with such rules of law as must apply to compensation acts. It must be measured to the extent and degree that it does away with the evils attendant upon the system of litigation, which has grown up under the principles of the common law, and measured by the extent and to the degree that it has substituted for such system proper and advantageous methods and rules with respect to ascertaining the amount due the injured employe, or his dependents in case of his death; keeping in mind always that when the protection of the law is afforded an employe under the provisions of such Compensation Act, the same protection must be afforded the employer, to the extent of limiting, according to prescribed rules, the liability to which he shall be subjected.

The Employers' Liability Law of the State of Arizona is not a substitute for former rights and remedies. It creates a new right, not to take the place of old ones, but supplemental or cumulative in its nature. It leaves open to the injured employe the common law action of negligence, as modified by our Constitution, and also the right to claim under the Compensation Act.

In the case of New York C. R. vs. White, 243 U. S. 188, *supra*, this Court considered the New York Workmen's Compensation Act, and specifically held in that case that it was a substituted system, devised to compensate employes or their dependents for injuries received in certain hazardous occupations, the measure of damages being based upon the loss of earning power, having regard to the previous wage and the character and duration of disability, and in case of death, benefits according to the dependency of the surviving wife, husband, etc. In that case, at page 201, it states:

"It is true that in the case of the statutes thus sustained there were reasons rendering the particular departures appropriate. Nor is it necessary, for the purposes of the present case, to say that a state might, without violence to the Constitutional guaranty of due process of law,' suddenly set aside all common law rules respecting liability as between employer and employee, without providing a reasonably just substitute. Considering the vast industrial organization of the State of New York, for instance, with hundreds of thousands of plants and millions of wage-earners, each employer on the one hand having embarked his capital, and each employee on the other having taken up his particular mode of earning a

livelihood, in reliance upon the probable permanence of an established body of law governing the relation, it perhaps may be doubted whether the state could abolish all rights of action on the one hand, or all defenses on the other, without setting up something adequate in their stead. No such question is here presented, and we intimate no opinion upon it.

"The statute under consideration sets aside one body of rules only to establish another system in its place. If the employee is no longer able to recover as much as before in case of being injured through the employer's negligence, he is entitled to moderate compensation in all cases of injury, and has a certain and speedy remedy without the difficulty and expense of establishing negligence or proving the amount of the damages. Instead of assuming the entire consequences of all ordinary risks of the occupation, he assumes the consequences, in excess of the scheduled compensation, of risks ordinary and extraordinary. On the other hand, if the employer is left without defense respecting the question at fault, he at the same time is assured that the recovery is limited, and that it goes directly to the relief of the designated beneficiary. And just as the employee's assumption of ordinary risks at common law presumably was taken into account in fixing the rate of wages, so the fixed responsibility of the employer, and the modified assumption of risk by the employee under the new system, presumably will be reflected in the wage scale. The Act evidently is intended as a just settlement of a difficult problem, affecting one of the most important

of social relations, and it is to be judged in its entirety."

Further on in the discussion of said case, it is stated:

"It is plain that, on grounds of natural justice, it is not unreasonable for the state, while relieving the employer from responsibility for damages measured by common law standards and payable in cases where he or those for whose conduct he is answerable are found to be at fault, to require him to contribute a reasonable amount, and according to a reasonable and definite scale, by way of compensation for the loss of earning power incurred in the common enterprise, irrespective of the question of negligence, instead of leaving the entire loss to rest where it may chance to fall—that is, upon the injured employee or his dependents. Nor can it be deemed arbitrary and unreasonable from the standpoints of the employee's interest, to supplant a system under which he assumed the entire risk of injury in ordinary cases, and in others had a right to recover an amount more or less speculative upon proving facts of negligence that often were difficult to prove, and substitute a system under which, in all ordinary cases of accidental injury, he is sure of a definite and easily ascertained compensation, not being obliged to assume the entire loss in any case, but in all cases assuming any loss beyond the prescribed scale. \* \* \* \*

"In excluding the question of fault as a cause of injury, the act in effect disregards the proximate cause and looks to one more remote—the primary cause, as it may be deemed—and that is, the employment itself. For this, both parties are responsible, since they voluntarily engage in it as coadven-



turers, with personal injury to the employee as a probable and foreseen result. \* \* \*

"Viewing the entire matter, it cannot be pronounced arbitrary and unreasonable for the state to impose upon the employer the absolute duty of making a moderate and definite compensation in money to every disabled employee, or, in case of his death, those who were entitled to look to him for support, in lieu of the common law liability confined to cases of negligence.

"This, of course, is not to say that any scale of compensation, however insignificant, on the one hand, or onerous, on the other, would be supportable. In this case, no criticism is made on the ground that the compensation prescribed by the statute in question is unreasonable in amount, either in general or in the particular case. Any question of that kind may be met when it arises."

The Employers' Liability Law of Arizona does not relieve "the employer from responsibility for damages, measured by common law standards." It does not "require him to contribute a reasonable amount, according to a reasonable and definite scale, by way of compensation for loss of earning power." It is not a substituted system, assuring the employee "a definite and easily ascertained compensation," and the employee is not required to assume "any loss beyond the prescribed scale."

Our Employers' Liability Law violates the recognized power of "the state to impose upon the employer the absolute duty of making a moderate and definite compensation in money to every disabled employee \* \* \* in lieu of the common law liability confined to cases of negligence," by permitting a recovery of an

unlimited amount, not for disability alone, as in the White case, but for physical suffering also. It is not a composition of losses sustained in a mutual joint adventure (as Justice Pitney reasons), in which accidental injury is inevitable and is expected, but it places all of the loss, without limitation, upon one of the "co-adventurers," to-wit, the employer.

The Employers' Liability Law not only practically deprives the employer of all of the defenses known to the common law, but takes from him the right to defend by showing that he was guilty of no fault. In other words, the legislation is all in favor of the employe, and the employer is given no chance to escape the unlimited liability imposed. When action is commenced under this Act, the employer has no alternative. He cannot relegate the employe to any other act or mode of procedure, except the one which the employe himself has selected. And when damages have been imposed in pursuance of the provisions of this law, under the conditions as fully stated herein, the employer is deprived of his property without due process of law, and is deprived of the equal protection of the law.

Respectfully submitted,

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in Error.

IN THE  
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

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**No. 603.**

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RAY CONSOLIDATED COPPER COMPANY,  
A CORPORATION, PLAINTIFF IN ERROR,

*vs.*

DAN VEAZEY, DEFENDANT IN ERROR.

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**BRIEF OF AMICUS CURIAE ON BEHALF OF  
PLAINTIFF IN ERROR.**

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The validity of the Arizona Employers' Liability Law is attacked in five cases now pending in this court, namely: Arizona Copper Company, Limited, *vs.* Richard Bray, and Arizona Copper Company, Limited, *vs.* Joseph B. Hammer, argued and submitted on January 26, 1918; the above-entitled cause argued and submitted on January 28, 1918; and Inspiration Consolidated Copper Company *vs.* Mendez, 166 Pacific, 278, 1183, No. 819 on the Docket of this court, and Superior and Pittsburgh Copper Company *vs.* Tomich, 165

Pacific, 1101, 1185, both decided by the Supreme Court of Arizona on July 2, 1917, and pending here on writ of error.

In view of the fact that the last-named cases were not in condition to be heard by this court with the cases heretofore submitted, upon motion of counsel in the above-entitled cause, this court on January 28, 1918, granted leave to the undersigned, as counsel for Inspiration Consolidated Copper Company in the Mendez case, to file herein a brief as *amicus curiae*. This brief is accordingly filed in accordance with this leave.

The Arizona statute has been challenged in each of these cases upon the ground that it deprives the employer of his property without due process of law, and denies to him the equal protection of the laws, and therefore offends against the Fourteenth Amendment.

The specific charge is that under the guise of a police measure, the law in fact imposes an unlimited liability without fault upon the employer, giving him no right to defend, and, therefore, no day in court, and that it is unreasonable and arbitrary and constitutes an unwarranted interference with individual rights, and sustains no reasonable relation to the public interest.

If this specification appears indefinite it is so because of the undefined scope of the police power by which this law is to be tested. While recognizing that this great governmental power is not without limitation, this court has consistently refrained from attempting any precise definition of it or any concrete specification of the limits of its proper exercise. It is held that each case coming here involving the police power must be decided upon its own peculiar facts; hence the line which separates the valid from the invalid law must continue to be shadowy and indistinct. As Justice Holmes said in *Noble State Bank vs. Haskell*, 219 U. S., 104, at page 112:

"With regard to the police powers, as elsewhere in the law, lines are pricked out by the gradual approach and contact of decisions on the opposing sides."

There are, however, some definite principles to be deduced from the decisions of this court. It has been recognized in all of the cases that free government rests primarily upon the inviolability of private right, and that the public welfare can justify interference with private right only to the extent which is reasonably necessary in view of the particular public need. Without multiplying citations, it is sufficient to refer to the following cases:

*Holden vs. Hardy*, 169 U. S., 366-389.

*Fletcher vs. Peck*, 4 Cranch, 87-135, 139.

*Humes vs. Ry. Co.*, 115 U. S., 521.

*Davidson vs. New Orleans*, 96 U. S., 97.

*Chicago Railway vs. Chicago*, 166 U. S., 226, 237.

As Justice Holmes said in the *Haskell* case, "the police power extends to all the great public needs" (219 U. S., at 111). The public need, therefore, is at once the justification for and the limitation upon the exercise of the police power. When the public need requires an interference with private right, the extent of the need defines the extent of permissible interference. This is all that is meant by the diverse statements of this court as to the requirement of reasonableness in all public measures. Thus far free government may go. Government may go further, but in doing so it ceases to be free government. (See the dissent of Justice Day in *Coppage vs. Kansas*, 236 U. S., at page 30.)

Said this court in *Lawton vs. Steele*, 152 U. S., 133, at 137:

"To justify the State in thus interposing its authority in behalf of the public, it must appear first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and second, that the means are reasonably necessary for the accomplishment of the purpose and not unduly oppressive upon individuals. The legislature may never, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual or unnecessary restric-

tions upon lawful occupations. In other words, its definition as to what is a proper exercise of police powers is not final or conclusive, but is subject to the supervision of the courts."

The principle, then, is this: A law in the nature of a police measure will be sustained if it reasonably corresponds to the public need.

What is the public need or interest with relation to the matter of responsibility of employers for non-negligent injuries to their employees? This question has been fully and explicitly answered by this court in *New York Central R. R. Co. vs. White*, 243 U. S., 189, at 207, where, in answering the criticism that the New York act under consideration did not concern itself with measures of prevention, Justice Pitney said:

"But the interest of the public is not confined to these (measures of prevention). One of the grounds of its concern with the continued life and earning power of the individual is its interest in the prevention of pauperism, with its concomitants of vice and crime."

This is the crux of the question. The public must care for its subjects if for any cause they become unable to care for themselves. Some accidents are bound to occur in industry in the entire absence of negligence. The public is therefore interested in avoiding pauperism resulting from loss or impairment of earning power due to non-negligent injury, and it is competent for the State to make provision reasonably necessary to accomplish this purpose. Nowhere is this proposition stated with greater clarity or force than in the dissent of Justice Brandeis in *New York Central Railway Company vs. Winfield*, 244 U. S., 147, at 165.

The public interest may find expression in widely divergent laws so far as their form is concerned, but the question of their validity comes always to this: Is the particular law reasonable? Is it reasonably necessary to safeguard the par-

ticular specific interest of the public as distinguished from that of some special class? It is not what the employer would consider reasonable, nor, again, what the employee or his dependents would consider fair, but what the public, which comprises both and protects both, considers fair in view of its public duty. That question is a judicial question for the courts, and ultimately, in each case, for this court.

There is no occasion for confusing the question of power with the question of policy. The State has power to pass reasonable and appropriate laws necessary to protect its people in their health, safety, and essential welfare. It has no power to pass unreasonable or unfair laws for any purpose. The concrete question in each case is whether the State has exceeded this power. That this is a judicial question, as above intimated, this court has unvaryingly held. (*Lawton vs. Steele*, 152 U. S., 133, at 137; *Holden vs. Hardy*, 169 U. S., 366, at 398.)

This court said in *Lochner vs. New York*, 198 U. S., 45, at 56:

“This is not a question of substituting the judgment of the court for that of the legislature. If the act be within the power of the State it is valid, although the judgment of the court might be totally opposed to the enactment of such a law. But the question would still remain: Is it within the police power of the State? and that question must be answered by the court.”

The precise judicial question here then is whether the Arizona law is a fair, reasonable, and appropriate means for protecting the public from the pauperism of workmen injured in industry.

This whole subject has been so recently and so thoroughly covered by the decisions of this court in the three cases involving the compensation acts of New York, Iowa, and Washington, that we naturally turn to those decisions for criteria to aid us in answering this question.

Those cases involved compensation systems, not liability laws. This court has made it clear that all compensation laws recognize the breaking down of the common law, with its traditional individualistic conception of tort or wrong as the sole basis of liability, as a solution of the problem of meeting losses from industrial injuries. As Justice Pitney said in the *White* case:

“\* \* \* it is evident that the consequences of a disabling or fatal injury are precisely the same to the parties immediately affected and to the community, whether the proximate cause be culpable or innocent.”

In short, “attention should be directed not to the employer’s fault, but to the employee’s misfortune,” if “social justice” is to be attained. Dissent of Justice Brandeis, *New York Central Railway Co. vs. Winfield*, 244 U. S., at page 165. The compensation system does not affect an “increase of the employer’s liability” (*Id.*, page 167). It imposes an obligation “in the nature of a tax” (*Id.*, 167). It recognizes that the fund, no matter how raised, is to be administered for the benefit of society as a whole, not for industry nor for labor.

As Justice Pitney said in the *White* case, 243 U. S., at page 205, the legislature in that case overlooked the proximate cause of the injury and concerned itself with the ultimate cause, which is “the employment itself.” “For this both parties are responsible, since they voluntarily engaged in it as co-adventurers with personal injury to employee as a probable and foreseen result” (*Id.*, page 205).

Again, the possibility of personal injury which confronts the workman presupposes an impairment or possibly complete loss of his earning power (243 U. S., at 203). “The physical suffering,” says Justice Pitney, “must be borne by the employee alone; the laws of nature prevent this from being evaded or shifted to another.”

Furthermore, the laws under consideration in the compensation cases possess attributes of reasonableness which appeal at once to the rational and fair-minded man. They abolish



personal injury litigation, either by express provision or by the necessary effect of their operation. They free the employer from the danger of excessive recoveries, and secure to the employee fair and prompt compensation, and provide that all moneys collected, from whatever source, shall go where they are intended to go, instead of being dissipated in large part for court costs and medical and legal fees. In short, they voice the "strong and preponderant opinion" of mankind that thus only can this difficult problem be solved. These features illustrate forcibly the proper spirit of reasonableness to be expected in appropriate and necessary police measures.

While much leeway must naturally be left to the sense of fairness of the legislature in details which are not finally determinative of the validity of the law, certain definite and controlling principles can be gleaned from the decisions of this court in these cases.

In the first place, the law must recognize the joint responsibility of master and servant. Any law that places the entire burden on either, regardless of fault, must be essentially unreasonable if the principle established by this court is to stand.

In the second place, the measure of compensation must have a fair relation to the loss which is to be borne. The only loss with which the public is concerned or can be concerned is the financial loss due to impaired earning power. The public has no concern with personal suffering entailed by injury, at least no such concern as will justify it in including that as an element of compensation. Physical suffering is something which not only must be borne by the individual, but which, in the very nature of the case, cannot be estimated in terms of money. Any law, therefore, which authorizes, or in its operation as construed by the State courts, permits recoveries based on pain and suffering and other kindred elements must be essentially unreasonable if the sensible distinction of this court is to be sustained.

In the third place, it follows from the two principles already laid down that the public interest in the solution of this problem requires a fair apportionment of the financial loss to the end that the workman and his dependents, on the one hand, may not suffer unduly by reason of these inevitable casualties; and that the industry, on the other hand, shall not be unduly burdened in this behalf. Any law to be sustained, therefore, must possess those elements of fairness, those compensating features to both parties, which enabled this court so properly to declare that the three laws under consideration in the compensation cases were not inherently arbitrary or contrary to the dictates of natural justice.

It is in the light of these principles that the Arizona law must be tested.

In order to understand its operation it is necessary to view it as a part of the local liability system. It is one of three remedies for industrial injury. The common-law liability for negligence and the action for wrongful death are preserved in Arizona. The law under consideration creates a liability for non-negligent injury and death. Thus the entire field of negligent and non-negligent injury and death is covered by litigation. The same field is likewise covered by the compensation act, which provides for compensation for negligent and non-negligent injuries regardless of the cause of the accident. Both the liability law and the compensation act purport to deal with hazardous occupations. In each a list of ten employments is set forth, practically identical in terms, which cover substantially the whole field of industry in Arizona in which any considerable number of workmen are employed or any considerable amount of capital is invested. Arizona is a new State, and its industries are not widely diversified. Mining and transportation and the mechanical trades connected with them, in which are utilized machinery and mechanical and electrical power, furnish the chief employment of Arizona labor. Likewise the population, particularly at the seats of these industries, is divided

roughly between employer and employee, with the latter greatly in the majority, since these industries are practically all operated by corporate agencies. There is an absence in the State of those disinterested classes, more or less impartial as between labor and capital, from whom in the older States jurors may frequently be obtained for service in the trial of injury cases. The State law permits a majority of nine of a jury to render a verdict. Under these circumstances comparatively few injured workmen resort to the compensation act, and as is quite natural the great majority resort to the courts, with the result that the tribunals, both State and Federal, find their chief activity in deciding cases between master and servant. It is the attractiveness of litigation, and not the defects of the compensation act that brings this about.

The law under consideration declares the employer liable to damages in the enumerated occupations in all cases of injury from accidents arising out of and in the course of the employment and due to a condition or conditions of it, and not caused by the negligence of the workman. In case of death there is a liability to the dependent relatives of the workman, and in default of such, to the estate.

The term due to a condition of the work is a novel one. It finds no place in labor legislation, and has therefore never received judicial definition outside of Arizona. It has not been defined with great clearness in that State. However, its operation as a basis of liability has been made sufficiently clear for the purpose of these cases. In the Hammer and Bray cases, argued here on January 26, the United States District Court instructed the jury that the employer was liable under this law, even though he were wholly free from fault. (See printed extracts from the record in the Hammer case, page 14, and in the Bray case, page 12.) In the Mendez case, 166 Pacific, 278, the record of which is here but has not been printed, the trial court instructed the jury that the term "condition of the work" did not include conditions due to the employer's negligence. In short, that liability did not

depend at all upon the employer's fault. The Supreme Court recognized that no question of fault was presented, and that the judgment must be sustained, if at all, in the entire absence of charge and proof of fault. This law, as uniformly construed by the local courts, authorizes recovery in the entire absence of negligence on the part of the employer.

Again, it would not be expected that a legislature adopting such a drastic liability should provide for effective defenses against its enforcement. The act, however, declares that all questions of assumption of risk and contributory negligence under this law shall be left to the jury. The Federal court holds that neither of these defenses has any place in the law, and therefore refuses to instruct upon them. The State court, by a less direct method, reaches substantially the same result. It holds that there can be no assumption of risk as to those risks which are inherent in the work. Since these are the only risks upon which liability is predicated, the plea of assumption of other risks having nothing to do with the liability obviously could not avail. Yet the State court holds that the plea may be made as to these other risks, and that the defense, therefore, is not abrogated. This is aptly characterized by Justice Ross as an absurdity. (*Inspiration Consolidated Copper Co. vs. Mendez*, 166 Pacific, 278, 1183.) Likewise as to "contributory negligence" the Supreme Court holds that the defendant can avail himself of this plea only at the expense of admitting his own negligence, and thus importing into the case an issue which the plaintiff has not presented, and that the defendant by pleading this defense estops himself from denying his own negligence (*Id.*, 278). Thus, as construed by the State court, the employer has no real defense.

The recovery authorized is unlimited. The Supreme Court justifies the law in part upon the ground that the damages could not be limited under the State Constitution (166 Pacific, 278). The recovery is not confined to "compensation." It is not limited to a portion or even to all of the loss of earn-

ings or earning power. It is an award of "damages" to be determined from "all the facts of the case" (Hammer case, printed extract, page 15). It covers mental and physical pain and anguish and disfigurement (Bray case, printed extract, page 14). It means damages as estimated in tort actions (Dissent of Ross, Superior and Pittsburgh Copper Co. *vs.* Tomich, 165 Pacific, at page 1186). This is clear also from the majority opinion in the Tomich case (165 Pacific, 1101).

In case of injuries resulting in death, the law does not confine the liability to instances where dependent relatives survive. Where no dependent relatives survive, the employer is still liable in damages to the administrator for the benefit of the estate. This can only mean damages estimated in terms of probable future earnings of the deceased, had he lived, measured by his life expectancy.

Such is the Arizona law. It creates unlimited liability for non-negligent accidents, to be enforced in a judicial proceeding in which the defendant has no defense, and prescribes a measure of damages such as the common law imposes as a punishment for wrong (244 U. S., 147, at 164).

The rules of the common law permitting pain, suffering, mental and physical anguish, humiliation, and disfiguration to be considered as elements for which damages may be awarded have served only to afford judicial sanction for unjust and highly excessive awards, awards out of all proportion to the injuries sustained and to the standards fixed by amicable settlements between rational men. The courts, both trial and appellate, are exceedingly reluctant to disturb the jury's award, until the books abound in examples of verdicts sustained of ten thousand, twenty thousand, thirty thousand, and even fifty thousand dollars. Unless the particular recovery offends the conscience of the court, it must be allowed to stand. There being confessedly no means of measuring the money value of these elements, no practicable limit can be placed upon the jury's action. The administration of

this law already shows that what is true of common-law cases is equally true of the law under attack. The same principles are applied by the highest court of Arizona to verdicts rendered under this law as to verdicts based on negligence (*Superior and Pittsburgh Copper Co. vs. Tomich*, 165 Pacific, 1101, at 1104, paragraph 7). This very situation was commented on by Justice Ross in his dissent at page 1186.

As thus construed and administered the law cannot be sustained as a proper exercise of the police power.

It cannot be justified as a measure regulating dangerous employments. Its declared purpose is to protect the safety of workmen. It does not protect. No duties are imposed on the employer. He is held liable for unpreventable accidents—for inevitable casualties—due in no degree to human fault. What is not caused by negligence cannot be prevented by care. The declaration of purpose, therefore, is out of harmony with the liability imposed. There is also a provision as to the promulgation of rules by the employer. The promulgation of rules and their enforcement can neither prevent inevitable accidents nor furnish the employer any solace under this law. In none of the cases in this court was the question of rules involved. This provision in the law is also a false quantity. As Justice Pitney said in *Coppage vs. Kansas*, 236 U. S., 1, at page 15:

“\* \* \* When a party appeals to this court for the protection of rights secured to him by the Federal Constitution, the decision is not to depend upon the form of the State law, nor upon its declared purpose, but rather upon its operation and effect as applied and enforced by the State; and upon these matters this court cannot, in the proper performance of its duty, yield its judgment to that of the State court.”

As Justice Grier said in the *Passenger Cases*, 7 How., 283, 458, “its true character cannot be changed by its collocation.” Clearly this law does not regulate dangerous employments in any sense.

*Adams vs. Tanner*, 244 U. S., 590, 593.

Does it affect the general welfare?

This court held in the White case that—

“laws regulating the responsibility of employers for injury to their employees arising out of the employment \* \* \* may be regarded as coming within the category of police regulations.”

The New York law under consideration “regulates” in a most thoroughgoing manner. This law regulates nothing. It simply imposes liability, and its “procedural provisions” afford the employer only the single right of listening to the verdict.

If we assume that this law falls “within the category of police regulations” simply because it relates to the liability of master and servant (see *Lochner vs. New York*, 198 U. S., at page 56, *et seq.*), the question arises as to its reasonableness.

If the public need has any bearing upon the question of the reasonableness of a law purporting to be passed to protect it, this law is clearly beyond the fair limit of police regulation. It penalizes the employer as for a wrong, when he has done no wrong. It opens the door for damages based upon elements that cannot be fairly measured in money, and with which the public has no possible concern. He is subjected to liability according to common-law standards, but is deprived of common-law defenses. If guilty of negligence, and sued therefor, he may defend and may conceivably escape all liability. If free from fault his guilt is prejudged, and there is no escape from punishment. No free government can be interested in such a result, except to destroy the infamous measure that makes such a result possible. If the injured workman dies from the hurt, leaving no dependents, his administrator may nevertheless ask a jury to determine how much the deceased would probably have earned during his natural expectancy of life, and the employer must hand it over for the benefit of non-dependent heirs, probably rich to affluence, or in default of all heirs, to escheat to the State.

If such a law is to be sustained as consonant with natural justice as understood by fair-minded and rational men, it must be because there is no power anywhere which can prevent legislatures from arbitrarily providing that private property shall be transferred from one person to another without compensation. There is no distinction in principle between the every-day result of the operation of this law and the extreme illustration just given, and suggested by this court in *Davidson vs. New Orleans*, 96 U. S., 97, at page 102.

What has been said is not so much a denunciation of the jury system as it is a criticism of the principles that govern the jury's deliberations in the assessment of damages. It might be possible to pass a valid law founded upon the principles which lie at the bottom of the compensation system, providing for compensation to be awarded by a jury instead of by a board. The point is that the principles governing the award, by whomever it is made, must be fair and reasonable and calculated to achieve results that will bear a real relation to the public interest.

The legal principle that differentiates this law from the compensation acts sustained by this court is that those laws provide for compensation based upon earning power, while this law establishes liability for damages based upon considerations in which the public is in nowise interested. Those laws expressly or in effect supplant the common law with a juster system, while this law leaves the old law in effect and adds a new lawsuit, with predetermined liability. Those laws solve the problem along the lines of the best thought of the age; this law ignores all that is best in modern industrial advance. It adheres to litigation and makes litigation so oppressive to the employer and so attractive to labor that it constitutes a serious menace not only to the further progress, but to the very existence, of the compensation system in America.

In conclusion, the Arizona law "is arbitrary and unreasonable from the standpoint of natural justice" (243 U. S., 188, 202). "It transcends the limits of permissible State action"



(*Id.*, 202). It deprives the employer of his property without due process of law, and oversteps that measurable interference with private right which under any view can be sustained. "Either by general principles which are common to our free institutions or by the particular provisions of the Constitution of the United States" (*Fletcher vs. Peck*, 4 Cranch, 87, at 139) the State is restrained from enforcing such a law. It should be annulled.

Respectfully submitted,

EDWARD W. RICE.

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The Arizona system allows the injured employee an election of remedies, permitting restricted recovery under a "compensation law" although he has been guilty of contributory negligence, and full compensatory damages under the Employers' Liability Act if he has not. *Held*, not inconsistent with the due process or equal protection clauses, as respects employers. P. 430.

CONCURRING OPINION OF HOLMES, J.:—

That certain voluntary conduct may constitutionally be put at the peril of those pursuing it finds illustrations in the criminal law and in the extent to which a master may be held for acts of a servant. P. 432.

The criterion of fault itself involves applying the external standard of prudence, and the decision of a jury. *Id.*

Holding the employer liable for accidents tends directly to secure attention to the safety of the men,—an unquestionably constitutional object of legislation. *Id.*

In allowing damages for pain and mutilation, the Arizona law constitutionally may have been based on the view that, if a business is unsuccessful it means that the public does not care enough for it to make it pay, and, if it is successful, the public pays the expenses, and something more, and should pay, as part of the cost of producing what it wants, the cost of pain and mutilation incident to the production; and that, by throwing that loss upon the employer in the first instance, it is thrown in the long run, justly, upon the public. P. 433.

The liability under this law is limited to a conscientious valuation of the loss, and it is to be presumed that juries and courts will confine it accordingly. *Id.*

It is not urged, in this case, that the provision for 12 per cent. interest from the date of suit, in case of an unsuccessful appeal, is void. P. 434.

19 Arizona, 151; *id.* 182, affirmed.

THE cases are stated in the opinion.

*Mr. Ernest W. Lewis* and *Mr. John A. Garver*, with whom *Mr. W. C. McFarland* was on the briefs, for plaintiff in error in Nos. 20, 21:

In reaching the conclusion that the workmen's com-

pensation acts of New York, Iowa and Washington were a valid exercise of legislative power, this court was influenced by two considerations: one, involving a legal principle, that in taking away the common-law defenses, or some of them, from the employer, the legislature had substituted a substantial equivalent, in limiting the liability of the employer according to a prescribed and reasonable schedule, which would probably not be any more onerous upon him than his common-law liability; and the other, involving social and economic considerations, that the legislation was a valid exercise of the police power, in promoting the general welfare. *New York Central R. R. Co. v. White*, 243 U. S. 188, 203; *Hawkins v. Bleakly*, 243 U. S. 210; *Mountain Timber Co. v. Washington*, 243 U. S. 219, 234.

The justification for legislation of this kind is that, in the interest of society, hazardous occupations should themselves be charged with the reasonable burden of sustaining the inevitable loss resulting from the inherent risks of the business, which no ordinary care or foresight can guard against, and that a liability or insurance fund should be created by a tax upon the business, which, on the one hand, will afford substantial and speedy compensation to the injured employee, and prevent his becoming an object of charity, and, on the other hand, will protect the employer from uncertain and possibly ruinous verdicts that might bankrupt the business, to the injury, not only of the particular employer and of all other workmen employed by him, but of society generally. The fund is in the nature of an insurance against the joint risk in which the parties embark. The liability of the employer is defined and regulated according to the injuries sustained, and the right of the employee to receive, without delay, the entire compensation thus fixed, is established. Both employer and workman are directly benefited, and the State is relieved from caring for many

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unfortunates who might otherwise become dependent upon it.

But legislation of this kind, as this court pointed out, must be reasonable to the employer as well as to the employed. It promotes the general welfare only in so far as it relieves society from the ills of the existing system. One of the greatest of those ills was the heavy burden of litigation which the old system fostered, with long deferred and scant, if any, benefits to the person sustaining the injuries, with great expense both to the State and to the employer, and with an uncertain liability thrown upon the employer, against which he could protect himself only by insurance in companies whose principal business consisted in combating all claims for injuries.

The Arizona legislature completely failed to apply either of the principles referred to by this court. The employer is deprived of his common-law defenses and is given nothing in return, because the workman is left free to reject the compensation provided by the Workmen's Compensation Law. The statute will cause direct injury to society at large; for unlimited liability without fault will necessarily act as an effectual deterrent to the investment of capital in industries declared to be hazardous. Men of small means might be ruined by a single verdict; and large corporations would be in constant danger from excessive verdicts, as is obvious from the verdicts in these cases.

The Liability Law leaves a workman, whose injury is due solely to his own negligence, the right to demand compensation under the Workmen's Compensation Law. Thus, in the only instance in which an employer could interpose a complete defense under the Liability Law, he is obliged to make compensation under the Compensation Law.

A further peculiar consequence of this Liability Law is that, if the employer pleads that the negligence of the

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workman contributed to the injury, he is thereby prevented from claiming that he himself was not guilty of negligence, *Superior & Pittsburg Copper Co. v. Tomich*, 19 Arizona, 182; and if the employer is actually guilty of some negligence, he gets off more lightly than if he is entirely free from fault, because, in the former case, the liability will be apportioned between the employer and employee in proportion to their negligence. See dissenting opinion of Ross, J., in *Superior & Pittsburg Copper Co. v. Tomich*, *supra*.

A further peculiar feature of this Liability Law is that there may be a recovery in the case of death, even where there is no one in existence who was in any way dependent upon the decedent, and even though his next of kin may be enemies of the State and Nation, or even though he may have no ascertainable next of kin. Workmen's compensation laws should limit the benefits to the injured person or those actually dependent upon him; and this principle has been universally recognized in this and other countries.

No other State, so far as we have been able to ascertain, has ever gone to the extreme extent shown in this Arizona legislation, of subjecting employers to unlimited liability without any fault on their part, or without any compensating obligation on the part of the workmen. The Arizona Workmen's Compensation Law is a mere farce, so far as any protection to the employer is concerned; and it is resorted to by the workman only when his own conduct has effectually barred his recovery in an action at law.

There are certain cases in which the courts have recognized that there may be liability without fault; but they are exceptions to the general rule of liability under our law and depend on conditions which are in no way applicable to this situation. Some of them are based on the ancient insurer's liability of innkeepers and carriers, while others relate to the strict liability which has been

imposed on railroads in relation to damages caused by fire or by injuries to cattle. The latter are really not cases of liability without fault, as the liability is usually imposed only where there has been a failure to comply with some reasonable requirement, such as fencing the railroad's right of way. This is simply an instance of the power of the legislature to create a new obligation, failure to observe which is a sufficient wrong to be the basis of liability.

*Mr. Frank E. Curley* and *Mr. L. Kearney*, with whom *Mr. Frank H. Hereford* was on the briefs, for defendants in error in Nos. 20, 21.

*Mr. William H. King*, with whom *Mr. Alexander Britton*, *Mr. Evans Browne* and *Mr. F. W. Clements* were on the brief, for plaintiff in error in No. 232:

In *New York Central R. R. Co. v. White*, 243 U. S. 188, 201, this court considered the New York Workmen's Compensation Act, and specifically held that it was a substituted system, devised to compensate employees or their dependents for injuries received in certain hazardous occupations, the measure of damages being based upon the loss of earning power, having regard to the previous wage and the character and duration of disability, and in case of death, benefits according to the dependency of the surviving wife, husband, etc.

The Employers' Liability Law of Arizona does not relieve "the employer from responsibility for damages, measured by common-law standards." It does not "require him to contribute a reasonable amount, according to a reasonable and definite scale, by way of compensation for loss of earning power." It is not a substituted system, assuring the employee "a definite and easily ascertained compensation," and the employee is not required to assume "any loss beyond the prescribed scale."

It abuses the recognized power of "the State to impose upon the employer the absolute duty of making a moderate and definite compensation in money to every disabled employee . . . in lieu of the common-law liability confined to cases of negligence," by permitting a recovery of an unlimited amount, not for disability alone, as in the *White Case*, but for physical suffering also. It is not a composition of losses sustained in a mutual joint adventure (as Justice Pitney reasons), in which accidental injury is inevitable and is expected, but it places all of the loss, without limitation, upon one of the "co-adventurers," to-wit, the employer.

It not only practically deprives the employer of all of the defenses known to the common law, but takes from him the right to defend by showing that he was guilty of no fault. In other words, the legislation is all in favor of the employee, and the employer is given no chance to escape the unlimited liability imposed. When action is commenced under this act, the employer has no alternative. He cannot relegate the employee to any other act or mode of procedure, except the one which the employee himself has selected. And when damages have been imposed in pursuance of the provisions of this law, under the conditions before stated the employer is deprived of his property without due process of law, and denied the equal protection of the law.

No counsel appeared for defendant in error in No. 232.

*Mr. Edward W. Rice*, by leave of court, filed a brief as *amicus curiæ* in No. 232.

*Mr. Edward W. Rice*, with whom *Mr. Harvey M. Friend* was on the brief, for plaintiff in error in No. 332:

This law is in no sense a regulation of dangerous employments. No new duty is imposed upon the employer

and he is subjected to no liability for failure to discharge his duties, new or old. The law merely imposes a new pecuniary liability for injuries that cannot be foreseen or prevented by any degree of care. This cannot increase the care of the employer or protect the employee from injury. It merely seeks to impose a new liability on employers. It is devoid of all of the features that characterize measures which seek to attain social justice by regulating in the interest of the public the private relation of master and servant out of which losses from industrial accidents are bound to arise. Our conclusion is that this is merely a labor law confined to the rights and liabilities of the employee and employer and not a police measure in which the public has an interest. Consequently the question of its validity should be determined by the principles which govern laws affecting private rights as distinguished from those by which police measures enacted primarily to safeguard the public are to be tested. This court, throughout its career, has recognized how firmly the fabric of free government rests upon the inviolability of private right. The preservation of individual liberty and the protection of private property and of the right of private contract are essential to all free government. *Fletcher v. Peck*, 6 Cranch, 87, 135; *Chicago, Burlington & Quincy R. R. Co. v. Chicago*, 166 U. S. 226, 237; *Citizens' Savings & Loan Association v. Topeka*, 20 Wall. 663, 665; *Holden v. Hardy*, 169 U. S. 366, 389; *New York Central R. R. Co. v. White*, 243 U. S. 188, 202.

From the fact that private right must be subordinated to the public welfare, it does not follow that in those cases where the public welfare does not require the surrender of private right the legislature, merely as between individuals, may make arbitrary distribution of private losses. *Lochner v. New York*, 198 U. S. 45, 56. In the case of a mere labor law the slightest exaction would be beyond the legislative power. *Mountain Timber Co. v. Wash-*



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ington, 243 U. S. 219, 240. The law of negligence is founded upon reason. It is reasonable that an individual should refrain from causing injury to another by his negligence, and that he should make recompense for injury so caused, but it is self-evident that the establishment of a rule of unlimited liability without fault as the governing rule of individual responsibility would merely substitute for the old natural law of non-liability a new tyranny of irresponsible and arbitrary power. This is precisely what the Arizona law attempts to do.

The obligation of the individual to respond in damages for negligence and his right to immunity from liability when not at fault are thus among those obligations and rights that inhere in free government. It is because of their fundamental character that they have persisted throughout our legal history. Changes have been made from time to time in the administration of the law of negligence, as in the defenses available to relieve one charged with negligence, and in the extent of the duties assumed or imposed, the breach of which shall constitute negligence, and in the rules of evidence in such cases, but the individualistic basis of liability for personal injury, and its converse of immunity from responsibility in the absence of negligence, as rules of individual liability, have remained unchanged in their broad outlines. Nothing inherent in free government or natural justice requires that one charged with negligence should be allowed to urge the defenses of assumption of risk, contributory negligence or fellow-servant, or that the conception of duties, the breach of which constitute negligence, should not develop with the unfolding industrial life of the people. Therefore, as this court has repeatedly declared, these defenses may be modified or entirely abrogated and new duties may be created.

The distinction is both clear and fundamental between the proposition that, regardless of these defenses, an

employer shall be liable in damages for his negligence, either personal or properly imputed to him, and the further proposition that he shall be liable as for negligence when he is in no sense at fault. Under the first proposition the question of negligence still remains, and on this fundamental question the defendant has the right to defend. Under the second proposition, liability is practically prejudged. If the right to defend cannot thus be taken away indirectly by a conclusive presumption of negligence, *Mobile, Jackson &c. R. R. Co. v. Turnipseed*, 219 U. S. 35, 43, it cannot be taken away directly by a departure from the principle of negligence as the basis of individual liability for injury. *Middleton v. Texas Power & Light Co.*, 108 Texas, 96, 107. There are certain instances of liability which are sometimes cited as examples of liability without fault. *Chicago, Rock Island & Pacific Ry. Co. v. Zerneck*, 183 U. S. 582, 586; *New York Central R. R. Co. v. White*, 243 U. S. 188, 204. But when analyzed they will be found to furnish no substantial basis in reason or in law for the support of legislation such as that presented in this case. By the ancient law of deodands, the property of a man wholly innocent of wrong was confiscated by the Crown under the false cloak of religion. In admiralty, the ship itself is treated as a wrongdoer, but is only answerable for the wrong of those in charge of her. The maxim of agency "*qui facit per alium facit per se*," which is the real foundation of the husband's liability as well as that of the master, involves imputed fault in cases where the relation of the parties furnishes some foundation in justice for the imposition of liability. The fault is there, but it may not be the personal fault of the person charged with responsibility for it. The common-law liability of the carrier and of the innkeeper, of course, did not arise out of a mere personal relation. Both pursue a public calling, one charged with a public interest, and therefore peculiarly subject to regu-

lation in the interest of the public. It was never the law, so far as we know, that private carriers or private boarding-house keepers, who are free to serve whom they will, under such contracts as they may please to make, were liable as insurers to their patrons or guests. The analogy between the responsibility for dangerous agencies and liability for inevitable accidents in industry as between the joint adventurers pursuing such industry for their mutual profit is so remote as to furnish no real aid in the solution of the present problem.

Statutes requiring railroad companies to fence their rights of way and upon their failure to do so imposing upon them liability for stock killed have been upheld. In such cases the liability is for breach of duty validly imposed, *Gulf, Colorado & Santa Fe Ry. Co. v. Ellis*, 165 U. S. 150, 158; in short, a liability for negligence. Black, *Constitutional Law*, 2d ed., p. 351. Laws imposing liability for stock killed without requiring the right of way to be fenced, on the other hand, create a liability without fault. Such laws have been universally condemned.

It is indeed significant that in the whole legal history of individual liability there has been such a consistent aversion to the establishment of a liability without fault. It cannot be accounted for upon any other theory than that the principle itself is repugnant to the fundamental rights of liberty and property on which our institutions are founded. This rule of individual liability is one of the rules which the legislature is "prevented by constitutional limitations" from changing at its whim. *Munn v. Illinois*, 94 U. S. 113. It seems plain, therefore, that this law is a mere labor law, concerned only with the rights of individuals, and that as such it is clearly void.

The police power of the State is not without limitation. *Lawton v. Steele*, 152 U. S. 133, 137. The first inquiry here is whether the law deals with a subject-matter of public as distinguished from private concern; the second is

whether the measure is reasonably necessary and appropriate to achieve the public end sought. *Mountain Timber Co. v. Washington*, 243 U. S. 219, 238; *New York Central R. R. Co. v. White*, 243 U. S. 188, 207. Not every law that deals with a proper subject-matter of police regulation is to be construed as a police measure or is to be held valid as such. *Lochner v. New York*, 198 U. S. 45, 57.

The compensation systems considered by this court in the *White*, *Hawkins* and *Mountain Timber Company Cases*, regulate in a most thoroughgoing manner and in the interest of the public the whole subject-matter of compensation for industrial injury and death. The Arizona law has nothing in common with these laws. It does not regulate anything. As aptly remarked by Justice Ross in his dissent in this case, "Ours is not a system but a lawsuit."

It seems to us that the Arizona law is in no sense a police measure. However, if we treat it as such simply because it deals with a subject which may be regulated in the interest of the public, it follows from what the court has said (*New York Central R. R. Co. v. White*, 243 U. S. 188, 206), that it must be set aside as invalid unless it can be supported as an appropriate and proper exercise of the police power.

The extent of the public interest must mark the extreme limit of permissible interference with the private rights of the parties. The regulation of the relation of master and servant and of the compensation to be paid the servant in case of injury are conceivably matters of public concern, for the reason that, if the burden of injury losses is to fall on the workman, the injured man and his dependents are certain, in a considerable number of instances, to be pauperized and to be driven into vice and crime. *New York Central R. R. Co. v. White*, 243 U. S. 188, 207. The public is concerned, in the first place, with

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the method by which compensation is secured, to the end that it shall be fairly estimated and promptly paid, without burdensome expenses and friction between employer and employee. In the second place, the public is concerned with the amount of compensation so that the award shall be sufficient to protect the workman and his dependents against poverty and its attendant evils. This two-fold interest of the public must find appropriate expression in any law which can be sustained as a police regulation.

The first can be achieved only by abolishing litigation and establishing a just system of compensation. In the second place, as it is a matter of public concern that the award shall be sufficient to prevent pauperism and its evils, it is of equal concern that the award shall not exceed what is reasonably necessary to protect the workman and his dependents in these respects.

The physical hurt must be borne by the injured person; it cannot be shifted. *New York Central R. R. Co. v. White*, 243 U. S. 188, 203. Neither can the physical hurt be measured in terms of money. A law which authorizes an award of damages for pain and suffering and kindred elements does not serve the public interest. It does, however, open wide the door for speculative verdicts, which bear no true relation to the public interest or to the pecuniary loss sustained by the injured man. Neither can there be any suggestion of public concern in saddling upon the industry, or upon a particular employer, an unlimited liability to the estate of a deceased workman who has left no one dependent upon his labors, and therefore no one who has suffered pecuniary loss by his death.

This court, in the compensation cases, has expressly refrained from specifying the legal limits of permissible compensation under compensation laws. Nevertheless, the decisions make it clear that compensation must be based upon earnings, and cannot be allowed for specula-

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tive elements such as are included in the damages awarded under the Arizona law. It is equally manifest from these decisions that the rate of compensation must be certain or ascertainable on some definite basis and that it must be limited in amount. These restrictions follow logically from the court's conception of the compensation system as disregarding the immediate cause of the accident and as treating the employment itself for which employer and employee are jointly responsible as the true cause of the injury.

The Arizona law is as inconsistent with this conception as is the common law. It relieves the employer of none of the evils of the common law, but saddles upon him a new lawsuit for damages according to common-law standards, where he has exercised the utmost human care, and, in addition, penalizes him 12 per cent. of the jury's award if he fails on appeal.

*Mr. Graham Foster*, for defendant in error in No. 332, submitted. *Mr. Hugh M. Foster* and *Mr. George F. Senner* were on the brief.

*Mr. Cleon T. Knapp*, for plaintiff in error in No. 334, submitted:

If there is any justification for the enactment of such a law it must be found in the police power. This court has repeatedly recognized the difficulty of exactly defining that power. It is generally recognized as the right of a State to legislate for its general welfare and betterment. The extent to which it may be exercised is dependent largely upon industrial and social conditions. Each exercise must be measured of itself. *Noble State Bank v. Haskell*, 219 U. S. 104; *Camfield v. United States*, 167 U. S. 518.

The police power cannot be used in an arbitrary manner, calculated to deprive one of private rights. While it

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"extends to all great public needs" those same public needs place a limitation upon its valid exercise. The rule of reason must be applied. *Hurtado v. California*, 110 U. S. 516; *Hayes v. Missouri*, 120 U. S. 68; *Missouri Pacific Ry. Co. v. Mackey*, 127 U. S. 205; *Hallinger v. Davis*, 146 U. S. 314; *Holden v. Hardy*, 169 U. S. 366; *Barbier v. Connolly*, 113 U. S. 27. The power cannot be used as an excuse for unjust and oppressive legislation. *Davidson v. New Orleans*, 96 U. S. 97; *Yick Wo v. Hopkins*, 118 U. S. 356.

The question presented then is whether this law is calculated to benefit the public needs. And the test to be applied is not the mere wording, but whether in practice it would actually accomplish an object beneficial to the health, safety and general welfare. *Lochner v. New York*, 198 U. S. 45.

The Arizona Employers' Liability Law is in no way designed to benefit either the health, safety or general welfare. If it were designed to benefit the health and safety of employees it would be beneficial to public welfare. But it is not. If it removed existing ills in present social, industrial, or economic conditions in Arizona, it might, under certain circumstances, be beneficial to public welfare. But it does not. It adds to existing ills.

If any justification can be found for the law, it must be upon reasons supporting the legality of compulsory compensation acts. And it is solely upon such grounds that the Arizona Supreme Court attempted to justify its legality.

We assume that the decisions of this court in the *White*, *Hawkins*, and *Mountain Timber Company Cases* cover the field of justification for enactment of compensation laws. And if there is justification for this law, it must be found in the reasons there given. The decisions in those cases are influenced by the consideration that the legislature in the enactment of those laws substituted a substantial



equivalent. Our quarrel with the Arizona law is not so much that it abrogates the common-law rules of liability as that it absolutely fails to set up something adequate in their stead. It cannot be justified upon any of the grounds supporting the legality of compensation acts. It is not a "method of compensation." It is a suit for damages. It preserves the jury system of awarding damages in an unlimited amount, and should the employer be presumptuous enough to appeal, he is what might be called fined, by being assessed interest on the judgment at 12 per cent. The New York law was not pronounced arbitrary and unreasonable, for the reason that the compensation was moderate and definite. Under this law, judged by its history, the awards will never be moderate and never definite. It provides for damages not alone for loss of earning power, but for pain, suffering, mental and physical anguish, and humiliation, and the jury is quick to consider all such elements.

No evil attendant upon the old personal injury litigation has been removed. The law's delay, the court expense, the large attorney fee, the oft-times miscarriage of justice by inadequate verdicts, and more often by excessive verdicts, the bitterness growing from litigation; all these and many more are still attendant upon the trail of this law. Every reason prompting the enactment of compensation laws is lacking to support it. It is not designed in the remotest way to protect health, safety or public welfare. It is not a valid exercise of police power. The Arizona Supreme Court vainly searched for authorities to justify the constitutionality of the law, and was forced to base its decision entirely upon the reasons given in the *White Case* upholding the New York Compensation Law.

*Mr. Samuel Herrick*, for defendant in error in No. 334, submitted.



MR. JUSTICE PITNEY delivered the opinion of the court.

In each of these cases, a workman in a hazardous industry in the State of Arizona, having received in the course of his employment a personal injury through an accident due to a condition or conditions of the occupation, not caused by his own negligence or so far as appears by that of his employer or others, brought action under the Employers' Liability Law of Arizona, and recovered compensatory damages against the employer ascertained upon a consideration of the nature, extent, and disabling effects of the injury in each particular case. And the question is raised whether the statute referred to, as applied to the facts of these cases, is repugnant to that provision of the Fourteenth Amendment which declares that no State shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

Art. XVIII of the constitution of the State of Arizona is entitled "Labor," and contains, among others, the following sections:

"SECTION 4. The common law doctrine of fellow servants, so far as it affects the liability of a master for injuries to his servants resulting from the acts or omissions of any other servant or servants of the common master is forever abrogated.

"SECTION 5. The defense of contributory negligence or of assumption of risk shall, in all cases whatsoever, be a question of fact and shall, at all times, be left to the jury.

"SECTION 6. The right of action to recover damages for injuries shall never be abrogated, and the amount recovered shall not be subject to any statutory limitation.

"SECTION 7. To protect the safety of employees in all hazardous occupations, in mining, smelting, manufacturing, railroad or street railway transportation, or any other industry the Legislature shall enact an Employers' Lia-

bility law, by the terms of which any employer, whether individual, association, or corporation shall be liable for the death or injury, caused by any accident due to a condition or conditions of such occupation, of any employee in the service of such employer in such hazardous occupation, in all cases in which such death or injury of such employee shall not have been caused by the negligence of the employee killed or injured.

"SECTION 8. The Legislature shall enact a Workmen's Compulsory Compensation law applicable to workmen engaged in manual or mechanical labor in such employments as the Legislature may determine to be especially dangerous, by which compulsory compensation shall be required to be paid to any such workman by his employer, if in the course of such employment personal injury to any such workmen from any accident arising out of, and in the course of, such employment is caused in whole, or in part, or is contributed to, by a necessary risk or danger of such employment, or a necessary risk or danger inherent in the nature thereof, or by failure of such employer, or any of his or its officers, agents, or employee, or employees, to exercise due care, or to comply with any [law?] affecting such employment; Provided, that it shall be optional with said employee to settle for such compensation, or retain the right to sue said employer as provided by this Constitution."

Pursuant to § 7 the Employers' Liability Law was enacted (c. 89, Laws 1912, Reg. Sess.; Arizona Rev. Stats. 1913, pars. 3153-3162); pursuant to § 8 a Workmen's Compulsory Compensation Law was enacted (c. 14, Laws 1912, 1st Spec. Sess.; Arizona Rev. Stats. 1913, pars. 3163, *et seq.*).

In two of the present cases the former law was sustained by the Supreme Court of Arizona against attacks based upon the Fourteenth Amendment. *Inspiration Consolidated Copper Co. v. Mendez*, 19 Arizona, 151; *Superior &*

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*Pittsburg Copper Co. v. Tomich*, 19 Arizona, 182. In the three other cases it was sustained by the United States District Court for that District. And the resulting judgments in favor of the injured workmen are brought under our review by writs of error.

Some of the arguments submitted to us assail the wisdom and policy of the act because of its novelty, because of its one-sided effect in depriving the employer of defenses while giving him (as is said) nothing in return, leaving the damages unlimited, and giving to the employee the option of several remedies; as tending not to obviate but to promote litigation; and as pregnant with danger to the industries of the State. With such considerations this court can not concern itself. Novelty is not a constitutional objection, since under constitutional forms of government each State may have a legislative body endowed with authority to change the law. In what respects it shall be changed, and to what extent, is in the main confided to the several States; and it is to be presumed that their legislatures, being chosen by the people, understand and correctly appreciate their needs. The States are left with a wide range of legislative discretion, notwithstanding the provisions of the Fourteenth Amendment; and their conclusions respecting the wisdom of their legislative acts are not reviewable by the courts.

We have been called upon recently to deal with various forms of workmen's compensation and employers' liability statutes. *Second Employers' Liability Cases*, 223 U. S. 1, 47-53; *New York Central R. R. Co. v. White*, 243 U. S. 188, 196, *et seq.*; *Hawkins v. Bleakly*, 243 U. S. 210; *Mountain Timber Co. v. Washington*, 243 U. S. 219; *Middleton v. Texas Power & Light Co.*, 249 U. S. 152. These decisions have established the propositions that the rules of law concerning the employer's responsibility for personal injury or death of an employee arising in the course of the employment are not beyond alteration by legislation in

the public interest; that no person has a vested right entitling him to have these any more than other rules of law remain unchanged for his benefit; and that, if we exclude arbitrary and unreasonable changes, liability may be imposed upon the employer without fault, and the rules respecting his responsibility to one employee for the negligence of another and respecting contributory negligence and assumption of risk are subject to legislative change.

The principal contention is that the Arizona Employers' Liability Law deprives the employer of property without due process of law, and denies to him the equal protection of the laws, because it imposes a liability without fault, and, as is said, without equivalent protection. The statute, in respect of certain specified employments designated as inherently hazardous and dangerous to workmen—and reasonably so described—imposes upon the employer, without regard to the question of his fault or that of any person for whose conduct he is responsible, a liability in compensatory damages—excluding all such as are speculative or punitive (*Arizona Copper Co. v. Burciaga*, 177 Pac. Rep. 29)—for accidental personal injury or death of an employee arising out of and in the course of the employment and due to a condition or conditions of the occupation, in cases where such injury or death of the employee shall not have been caused by his own negligence. This is the substance of pars. 3154 and 3158, and they are to be read in connection with par. 3156, which declares what occupations are hazardous within the meaning of the law. By par. 3160, contracts and regulations exempting the employer from liability are declared to be void.

In effect, the statute requires the employer, instead of the employee, to assume the pecuniary risk of injury or death of the employee attributable to hazards inherent in the employment and due to its conditions and not to the negligence of the employee killed or injured. In deter-

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mining whether this departure from the previous rule is so arbitrary or inconsistent with the fundamental rights of the employer as to render the law repugnant to the Fourteenth Amendment, it is to be borne in mind that the matter of the assumption of the risks of employment and the consequences to flow therefrom has been regulated time out of mind by the common law, with occasional statutory modifications. The rule existing in the absence of statute, as usually enunciated, is that all consequences of risks inherent in the occupation and normally incident to it are assumed by the employee and afford no ground of action by him or those claiming under him, in the absence of negligence by the employer; and even risks arising from or increased by the failure of the employer to take the care that he ought to take for the employee's safety are assumed by the latter if he is aware of them or if they are so obvious that any ordinarily prudent person under the circumstances could not fail to observe and appreciate them; but if the employee, having become aware of a risk arising out of a defect attributable to the employer's negligence, makes complaint or objection and obtains a promise of reparation, the common law brings into play a new set of regulations, requiring the employer to assume the risk under certain circumstances, the employee under others. *Seaboard Air Line Ry. v. Horton*, 233 U. S. 492, 504, 505; 239 U. S. 595, 598, 599; and cases cited.

But these are no more than rules of law, deduced by the courts as reasonable and just, under the conditions of our civilization, in view of the relations existing between employer and employee *in the absence of legislation*. They are not placed, by the Fourteenth Amendment, beyond the reach of the State's power to alter them, as rules of future conduct and tests of responsibility, through legislation designed to promote the general welfare, so long as it does not interfere arbitrarily and unreasonably, and in

defiance of natural justice, with the right of employers and employees to agree between themselves respecting the terms and conditions of employment.

We are unable to say that the Employers' Liability Law of Arizona, in requiring the employer in hazardous industries to assume—so far as pecuniary consequences go—the entire risk of injury to the employee attributable to accidents arising in the course of the employment and due to its inherent conditions, exceeds the bounds of permissible legislation or interferes with the constitutional rights of the employer. The answer that the common law makes to the hardship of requiring the employee to assume all consequences, both personal and pecuniary, of injuries arising out of the ordinary dangers of the occupation is that the parties enter into the contract of employment with these risks in view, and that the consequences ought to be, and presumably are, taken into consideration in fixing the rate of wages. *Chicago, Milwaukee & St. Paul Ry. Co. v. Ross*, 112 U. S. 377, 383; *Northern Pacific R. R. Co. v. Herbert*, 116 U. S. 642, 647; *New York Central R. R. Co. v. White*, 243 U. S. 188, 199; *Farwell v. Boston & Worcester R. R. Corp.*, 4 Metc. 49, 57. In like manner the employer, if required—as he is by this statute in some occupations—to assume the pecuniary loss arising from such injury to the employee, may take this into consideration in fixing the rate of wages; besides which he has an opportunity, which the employee has not, to charge the loss as a part of the cost of the product of the industry.

There is no question here of punishing one who is without fault. That, we may concede, would be contrary to natural justice. But, as we have seen, the statute limits the recovery strictly to compensatory damages. And there is no discrimination between employer and employee except such as necessarily arises from their different relations to the common undertaking. Both are essential

to it, the one to furnish capital, organization, and guidance, the other to perform the manual work; both foresee that the occupation is of such a nature, and its conditions such, that sooner or later some of the workmen will be physically injured or maimed, occasionally one killed, without particular fault on anybody's part. (See 243 U. S. 203.) The statute requires that compensation shall be paid to the injured workman or his dependents, because it is upon them that the first brunt of the loss falls; and that it shall be paid *by* the employer, because he takes the gross receipts of the common enterprise, and by reason of his position of control can make such adjustments as ought to be and practically can be made, in the way of reducing wages and increasing the selling price of the product, in order to allow for the statutory liability. There could be no more rational basis for a discrimination; and it is clear that in this there is no denial of the "equal protection of the laws."

Under the "due process" clause, the ultimate contention is that men have an indefeasible right to employ their fellow men to work under conditions where, as all parties know, from time to time some of the workmen inevitably will be killed or injured, but where nobody knows or can know in advance which particular men or how many will be the victims, or how serious will be the injuries, and hence no adequate compensation can be included in the wages; and to employ them thus with the legitimate object of making a profit above their wages if all goes well, but with immunity from particular loss if things go badly with the workmen through no fault of their own, and they suffer physical injury or death in the course of their employment. In view of the subject-matter, and of the public interest involved, we cannot assent to the proposition that the rights of life, liberty, and property guaranteed by the Fourteenth Amendment prevent the States from modifying that rule of the common law



which requires or permits the workingman to take the chances in such a lottery.

The act—assuming, as we must, that it be justly administered—adds no new burden of cost to industry, although it does bring to light a burden that previously existed but perhaps was unrecognized, by requiring that its costs be taken into the reckoning. The burden is due to the hazardous nature of the industry, and is inevitable if the work of the world is to go forward. What the act does is merely to require that it shall be assumed, to the extent of a pecuniary equivalent of the actual and proximate damage sustained by the workman or those near to him, by the employer—by him who organizes the enterprise, hires the workmen, fixes the wages, sets a price upon the product, pays the costs, and takes for his reward the net profits, if any.

The interest of the State is obvious. We declared in the *White Case* (243 U. S. 207): "It cannot be doubted that the State may prohibit and punish self-maiming and attempts at suicide; it may prohibit a man from bartering away his life or his personal security; indeed, the right to these is often declared, in bills of rights, to be 'natural and inalienable'; and the authority to prohibit contracts made in derogation of a lawfully established policy of the State respecting compensation for accidental death or disabling personal injury is equally clear. . . . This statute does not concern itself with measures of prevention, which presumably are embraced in other laws. But the interest of the public is not confined to these. One of the grounds of its concern with the continued life and earning power of the individual is its interest in the prevention of pauperism, with its concomitants of vice and crime. And, in our opinion, laws regulating the responsibility of employers for the injury or death of employees arising out of the employment bear so close a relation to the protection of the lives and safety of those



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concerned that they properly may be regarded as coming within the category of police regulations." (Citing cases.)

And in *Mountain Timber Co. v. Washington*, 243 U. S. 219, 239, it was said: "Certainly, the operation of industrial establishments that in the ordinary course of things frequently and inevitably produce disabling or mortal injuries to the human beings employed is not a matter of wholly private concern."

Having this interest, the State of Arizona reasonably might say: "The rule of the common law requiring the employee to assume all consequences of personal injuries arising out of the ordinary dangers and normal conditions of a hazardous occupation, and to secure his indemnity in advance in the form of increased wages, is incompatible with the public interest because—assuming that workmen are on an equality with employers in a negotiation about the rate of wages—the probability of injury occurring to a particular employee, and the nature and extent of such injury, are so contingent and speculative that it is impracticable for either employer or employee approximately to estimate in advance how much allowance should be made for them in the wages; and even were a proper allowance made, experience demonstrates that under our conditions of life it is not to be expected that the average workingman will set aside out of his wages a proper insurance against the time when he may be injured or killed. Hence, recognizing that injuries to workmen constitute a part of the unavoidable cost of hazardous industries, we will require that it be assumed by the one in control of the industry as employer, just as he pays other items of cost; so that he shall not take a profit from the labor of his employees while leaving the injured ones, and the dependents of those whose lives are lost, through accidents due to the conditions of the occupation, to be a burden upon the public."

Whether this or similar reasoning was employed, we

have no means of knowing; whether, if employed, it ought to have been accepted as convincing, is not for us to decide. It being incumbent upon the opponents of the law to demonstrate that it is clearly unreasonable and arbitrary, it is sufficient for us to declare, as we do, that such reasoning would be pertinent to the subject and not so unfounded or irrational as to permit us to say that the State, if it accepted it as a basis for changing the law in a matter so closely related to the public welfare, exceeded the restrictions placed upon its action by the Fourteenth Amendment.

It is objected that the responsibility of the employer under this statute is unlimited; but this is not true except as it is true of every action for compensatory damages where the amount awarded varies in accordance with the nature and extent of the damages for which compensation is made. It is said that in actions by employees against employers juries are prone to render extravagant verdicts. The same thing has been said, and with equal reason, concerning actions brought by individuals against railroad companies, traction companies, and other corporations. In this, as in other cases, there is a corrective in the authority of the court to set aside an exorbitant verdict. And it amounts to a contradiction of terms to say that in submitting a controversy between litigants to the established courts, there to be tried according to long-established modes and with a constitutional jury to determine the issues of fact and assess compensatory damages, there is a denial of "due process of law."

Much stress is laid upon that part of our opinion in the *White Case* where, after citing numerous previous decisions upholding the authority of the States to establish by legislation departures from the fellow-servant rule and other common-law rules affecting the employer's liability for personal injuries to the employee, we said (243 U. S. 201): "It is true that in the case of the statutes thus

sustained there were reasons rendering the particular departures appropriate. Nor is it necessary, for the purposes of the present case, to say that a State might, without violence to the constitutional guaranty of 'due process of law,' suddenly set aside all common-law rules respecting liability as between employer and employee, without providing a reasonably just substitute. . . . No such question is here presented, and we intimate no opinion upon it. The statute under consideration sets aside one body of rules only to establish another system in its place," etc.

In spite of our declaration that no opinion was intimated, this is treated as an intimation that a statute such as the one now under consideration, creating a new and additional right of action and allowing no defense (if the conditions of liability be shown) unless the accident was caused by the negligence of the injured employee, would be regarded as in conflict with the due process clause. We cannot, however, regard this statute as anything else than a substitute for the law as it previously stood; whether it be a proper substitute was for the people of the State of Arizona to determine; but we find no ground for declaring that they have acted so arbitrarily, unreasonably, and unjustly as to render their action void. They have resolved that the consequences of a personal injury to an employee attributable to the inherent dangers of the occupation shall be assumed, not wholly by the particular employee upon whom the personal injury happens to fall, but, to the extent of a compensation in money awarded in a judicial tribunal according to the ordinary processes of law, shall be assumed by the employer; leaving the latter to charge it up, so far as he can, as a part of the cost of his product, just as he would charge a loss by fire, by theft, by bad debts, or any other usual loss of the business; and to make allowance for it, so far as he can, in a reduced scale of wages. And they have come to this resolution, we repeat, not in a matter of in-

difference, or upon a question of mere economics, but in the course of regulating the conduct of those hazardous industries in which human beings—their own people—in the pursuit of a livelihood must expose themselves to death or to physical injuries more or less disabling, with consequent impoverishment, partial or total, of the workman or those dependent upon him. The statute says to the employer, in effect: "You shall not employ your fellow men in a hazardous occupation for gain, you being in a position to reap a reward in money through selling the product of their toil, unless you come under an obligation to make appropriate compensation in money in case of their death or injury due to the conditions of the occupation." The rule being based upon reasonable grounds affecting the public interest, being established in advance and applicable to all alike under similar circumstances, there is, in our opinion, no infringement of the fundamental rights protected by the Fourteenth Amendment.

Some expressions contained in our opinion in the *White Case* (243 U. S. 203, 204, 205,) are treated in argument as if they were equivalent to saying that if a State, in making a legislative adjustment of employers' liability, departs from the common-law system of basing responsibility upon fault, it must confine itself to a limited compensation, measured and ascertained according to the methods adopted in the compensation acts of the present day. Of course nothing of the kind was intended. In a previous part of the opinion (pp. 196–200) it had been shown that the employer had no constitutional right to continued immunity from liability in the absence of negligence, nor to have the fellow-servant rule and the rules respecting contributory negligence and assumption of risk remain unchanged. The statutory plan of compensation for injured workmen and the dependents of those fatally injured—an additional feature at variance with the common law—was then upheld; but, of course, without

saying that no other would be constitutional. For if, as we held in that case, the novel statutory scheme of awarding compensation according to a prearranged scale is sustainable, it follows, perhaps *a fortiori*, that the Arizona method of ascertaining the compensation according to the facts of each particular case—substantially the common law method—is free from objection on constitutional grounds. Indeed, if a State recognizes or establishes a right of action for compensation to injured workmen upon grounds not arbitrary or fundamentally unjust, the question whether the award shall be measured as compensatory damages are measured at common law, or according to some prescribed scale reasonably adapted to produce a fair result, is for the State itself to determine. Whether the compensation should be paid in a single sum after judgment recovered, as is required by the Arizona Employers' Liability Law just as under the common law system in the case of a judgment based upon negligence, or whether it would be more prudent to distribute the award by instalment payments covering the period of disability or of need, likewise is for the State to determine, and upon this the plaintiffs in error can raise no constitutional question.

To the suggestion that the act now or hereafter may be extended by construction to non-hazardous occupations, it may be replied: first, that the occupations in which these actions arose were indisputably hazardous, hence plaintiffs in error have no standing to raise the question (*Plymouth Coal Co. v. Pennsylvania*, 232 U. S. 531, 544; *Jeffrey Mfg. Co. v. Blagg*, 235 U. S. 571, 576; *Hendrick v. Maryland*, 235 U. S. 610, 621; *Middleton v. Texas Power & Light Co.*, 249 U. S. 152, 157); and secondly, it hardly is necessary to add that employers in non-hazardous industries are in little danger from the act, since it imposes liability only for accidental injuries attributable to the inherent dangers of the occupation.

To the objection that the benefits of the act may be extended, in the case of death claims, to those not nearly related to or dependent upon the workman, or even may go by escheat to the State, it is sufficient to say that no such question is involved in these records; in *Arizona Copper Co. v. Burciaga*, 177 Pac. Rep. 29, a case of personal injuries not fatal, the Supreme Court of Arizona interpreted the act as limiting the recovery to compensatory damages; it reasonably may be so construed in its application to death claims; and it would be improper for this court to assume in advance that the state court will place such a construction upon the statute as to render it obnoxious to the Federal Constitution. *Plymouth Coal Co. v. Pennsylvania*, 232 U. S. 531, 546; *St. Louis Southwestern Ry. Co. v. Arkansas*, 235 U. S. 350, 369.

It is insisted that the Arizona system deprives employers of property without due process of law and denies them equal protection because it confers upon the employee a free choice among several remedies. In *Consolidated Arizona Smelting Co. v. Ujack*, 15 Arizona, 382, 384, the Supreme Court of the State said: "Under the laws of Arizona, an employee who is injured in the course of his employment has open to him three avenues of redress, any one of which he may pursue according to the facts of his case. They are: (1) The common-law liability relieved of the fellow-servant defense and in which the defenses of contributory negligence and assumption of risk are questions to be left to the jury. Const., secs. 4, 5, art. 18. (2) Employers' liability law, which applies to hazardous occupations where the injury or death is not caused by his own negligence. Const., sec. 7, art. 18. (3) The compulsory compensation law, applicable to especially dangerous occupations, by which he may recover compensation without fault upon the part of the employer. Const., sec. 8, art. 18." It is said by counsel that the compensation act, because it limits the recovery,

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never is resorted to in practice unless the employee has been negligent and hence is debarred of a remedy under the liability act. But it is thoroughly settled by our previous decisions that a State may abolish contributory negligence as a defense; and election of remedies is an option very frequently given by the law to a person entitled to an action; an option normally exercised to his own advantage, as a matter of course.

Other points are suggested, but none requiring particular discussion.

*Judgments affirmed.*

MR. JUSTICE HOLMES concurring.<sup>1</sup>

The plaintiff (the defendant in error) was employed in the defendant's mine, was hurt in the eye in consequence of opening a compressed air valve and brought the present suit. The injury was found to have been due to risks inherent to the business and so was within the Employers' Liability Law of Arizona, Rev. Stats. 1913, Title 14, c. 6. By that law as construed the employer is liable to damages for injuries due to such risks in specified hazardous employments when guilty of no negligence. Par. 3158. There was a verdict for the plaintiff, judgment was affirmed by the Supreme Court of the State, 19 Arizona, 151, and the case comes here on the single question whether, consistently with the Fourteenth Amendment, such liability can be imposed. It is taken to exclude "speculative, exemplary and punitive damages," but to include all loss to the employee caused by the accident, not merely in the way of earning capacity, but of disfigurement and bodily or mental pain. See *Arizona Copper Co. v. Burciaga*, 177 Pac. Rep. 29, 33.

There is some argument made for the general proposi-

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<sup>1</sup> This concurring opinion was delivered in one of the five cases, viz, No. 332, *Inspiration Consolidated Copper Company v. Mendez*.



tion that immunity from liability when not in fault is a right inherent in free government and the *obiter dicta* of Mr. Justice Miller in [*Citizens' Savings & Loan Association v. Topeka*, 20 Wall. 655, are referred to. But if it is thought to be public policy to put certain voluntary conduct at the peril of those pursuing it, whether in the interest of safety or upon economic or other grounds, I know of nothing to hinder. A man employs a servant at the peril of what that servant may do in the course of his employment and there is nothing in the Constitution to limit the principle to that instance. *St. Louis & San Francisco Ry. Co. v. Mathews*, 165 U. S. 1, 22. *Chicago, Rock Island & Pacific Ry. Co. v. Zerneck*, 183 U. S. 582, 586. *St. Louis, Iron Mountain & Southern Ry. Co. v. Taylor*, 210 U. S. 281, 295. See *Guy v. Donald*, 203 U. S. 399, 406. There are cases in which even the criminal law requires a man to know facts at his peril. Indeed, the criterion which is thought to be free from constitutional objection, the criterion of fault, is the application of an external standard, the conduct of a prudent man in the known circumstances, that is, in doubtful cases, the opinion of the jury, which the defendant has to satisfy at his peril and which he may miss after giving the matter his best thought. *The Germanic*, 196 U. S. 589, 596. *Nash v. United States*, 229 U. S. 373, 377. *Eastern States Retail Lumber Dealers' Association v. United States*, 234 U. S. 600, 610. *Miller v. Strahl*, 239 U. S. 426, 434. Without further amplification so much may be taken to be established by the decisions. *New York Central R. R. Co. v. White*, 243 U. S. 188, 198, 204. *Mountain Timber Co. v. Washington*, 243 U. S. 219, 336.

I do not perceive how the validity of the law is affected by the fact that the employee is a party to the venture. There is no more certain way of securing attention to the safety of the men, an unquestionably constitutional object of legislation, than by holding the employer liable



for accidents. Like the crimes to which I have referred they probably will happen a good deal less often when the employer knows that he must answer for them if they do. I pass, therefore, to the other objection urged and most strongly pressed. It is that the damages are governed by the rules governing in action of tort—that is, as we have said, that they may include disfigurement and bodily or mental pain. Natural observations are made on the tendency of juries when such elements are allowed. But if it is proper to allow them of course no objection can be founded on the supposed foibles of the tribunal that the Constitution of the United States and the States have established. Why then, is it not proper to allow them? It is said that the pain cannot be shifted to another. Neither can the loss of a leg. But one can be paid for as well as the other. It is said that these elements do not constitute an economic loss, in the sense of diminished power to produce. They may. *Ball v. William Hunt & Sons, Ltd.*, [1912], A. C. 496. But whether they do or not they are as much part of the workman's loss as the loss of a limb. The legislature may have reasoned thus. If a business is unsuccessful it means that the public does not care enough for it to make it pay. If it is successful the public pays its expenses and something more. It is reasonable that the public should pay the whole cost of producing what it wants and a part of that cost is the pain and mutilation incident to production. By throwing that loss upon the employer in the first instance we throw it upon the public in the long run and that is just. If a legislature should reason in this way and act accordingly it seems to me that it is within constitutional bounds. *Erickson v. Preuss*, 223 N. Y. 365. It is said that the liability is unlimited, but this is not true. It is limited to a conscientious valuation of the loss suffered. Apart from the control exercised by the judge it is to be hoped that juries would realize that unreasonable verdicts would tend to

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make the business impossible and thus to injure those whom they might wish to help. But whatever they may do we must accept the tribunal, as I have said, and are bound to assume that they will act rightly and confine themselves to the proper scope of the law.

It is not urged that the provision allowing twelve per cent. interest on the amount of the judgment from the date of filing the suit, in case of an unsuccessful appeal, is void. *Fidelity Mutual Life Association v. Mettler*, 185 U. S. 308, 325-327. *Consaul v. Cummings*, 222 U. S. 262, 272.

MR. JUSTICE BRANDEIS and MR. JUSTICE CLARKE concur in this statement of additional reasons that lead me to agree with the opinion just delivered by my brother PITNEY.

MR. JUSTICE McKENNA dissenting.

I find myself unable to concur, yet reluctant to dissent. The case is of the kind that, once pronounced, will be a rule in like or cognate cases forever,—indeed, may even be extended. It is said to rest on the cases sustaining the workmen's compensation law of New York, 243 U. S. 188, and its associated cases in the same volume upholding like laws of other States. The present case certainly comes after those cases and has that symptom of being their sequence. They cannot be said to have been easy of judgment against the contentions and conservatism which opposed them, and there was, at least to me, no prophecy of their extent, and therefore to me the present case is a step beyond them. I hope it is something more than timidity, dread of the new, that makes me fear that it is a step from the deck to the sea—the metaphor suggests a peril in the consequences.

But let me in a more concrete way make application of this comment. I may assume that the purpose and principle and general extent of workmen's compensation laws

are known. I must rest on that assumption for even an epitome of them or the reasons for them would unduly extend this dissent. The Arizona law has no resemblance to them. It is a direct charge of liability upon the employer for death or injury incurred in his employment, he being without fault. Its remedies are the ordinary legal remedies; its measure of relief, however, has in it something more than the ordinary measures of relief, certainly not those of the compensation laws, nor is it as considerate and guarded as they. If its validity, therefore, can be deduced from the cases explanatory of those laws, it can only be done by bringing its instances and theirs under the same generalization, that is, that it is competent for government to charge liability and exempt from responsibility according as one is employer or employee, there being no other circumstance than that relation. Of this there can be no disguise. It may be confused by argument and attempt at historical analogies and deductions, but to that comprehensive principle the case must come at last. All else is adventitious and puts out of view the relation of the factors of production. It puts out of view that employers are as necessary to production as employees, and subjects to peril the voluntary conduct of the former and leaves out of account as an element the voluntary conduct of the latter. In other words, there is a clear discrimination,—a class distinction with its legal circumstances and, I may say, invidious circumstances, in view of some of the reasons adduced in its justification. And these effects cannot be concealed under any camouflage nor given the plausible and attractive gloss of public policy, justified by the different conditions of employer and employee. Unquestionably there is a difference—it constitutes the life of the relation. But the question is, Who shall compensate the injury that may result from the relation, voluntary assumed by both, urged by their respective interests and a calculation of advantage?

But I pass this discrimination and return to the law as a violation of the employer's rights considered absolutely and abstractly. It seems to me to be of the very foundation of right—of the essence of liberty as it is of morals—to be free from liability if one is free from fault. It has heretofore been the sense of the law and the sense of the world, pervading the regulations of both, that there can be no punishment where there is no blame; and yet the court now by its decision erects the denial of these postulates of conduct into a principle of law and governmental policy. In other words, it is said to be a benefit to government to put the exact discharge of duty under the menace of penalty and invert the conceptions of mankind of the relation of right and wrong action. If the legislation does not punish without fault what does it do? The question is pertinent. Consider what the employer does: he invests his money in productive enterprise—mining, smelting, manufacturing, railroading—he engages employees at their request and pays them the wages they demand, he takes all of the risks of the adventure. Now there is put upon him an immeasurable element that may make disaster inevitable. I find it difficult to answer the argument advanced to support or palliate this effect or independently of it to justify the interference with rights. It is a certain impeachment of some rights to assume that they need justification and a betrayal of them to make them a matter of controversy. There are precepts of constitutional law as there are precepts of moral law that reach the conviction of aphorisms and are immediately accepted by all who understand them, and comment is considered as confusing as unnecessary. I say this, not in dogmatism, but in expression of my vision of things, and I say it with deference to the contrary judgments of my brethren of the majority.

Of course, reasons may be found for the violation of rights, advantage to somebody or something in that viola-

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tion. Tyranny even may find pretexts and seldom boldly bids its will avouch its acts, and certainly there can be no accusation of bare-faced power in the Arizona law. Its motives and purposes are worthy and it requires some resolution of duty to resist them. It must be seen and is seen, however, that the difference between the position of employer and employee, simply considering the latter as economically weaker, is not a justification for the violation of the rights of the former, and that individual rights cannot be made to yield to philanthropy, and therefore the welfare of the government is brought forward and displayed. The law saves the government, is the comment, from the burden of paupers, its administration and peace from the disturbance of criminals. The answer, I think, is immediate. Government, certainly constitutional government, cannot afford to infringe, indeed, betrays its purpose if it infringes, a right of anybody upon money considerations or for ease in the exercise of its faculties.

But granting that there is something in the argument, what shall be the limits of its application? Will it extend the principle of the present case to non-hazardous employments? If not, why not? The Arizona law stops with certain occupations which it calls "hazardous," but it includes in the description "manufacturing" without qualifying words. In the New York compensation law passed on in *New York Central R. R. Co. v. White*, 243 U. S. 188, there were forty-two groups of hazardous occupations. In *Mountain Timber Co. v. Washington*, 243 U. S. 219, the court had quite a struggle with the provisions of the Washington compensation law, which was so far different from those of the other cases as to incur the dissent of members of the court. It is now, I think, of pertinent inquiry whether the quality of being hazardous is an inherent and necessary element of legality or a matter of legislative definition and policy. Besides, if there can be

liability without fault in one occupation, and that can be a principle of legislation, why not in any other? Who is to determine the application, court or legislature? If the latter, a court may not even express apprehension of its exercise, and yet it cannot put out of view the drift of events and in blind fatalism await their incidence when called upon to consider the legality of such exercise. We know things are in change—have changed—and a mark of it is that the drift of public opinion, and of legislation following opinion, is to alter the relation between employer and employee and to give to the latter a particular distinction, relieve him from a responsibility which would seem to be, and which until lately it has been the sense of the world to be, as much upon him as upon his employer, not in dependence, not as a mark of subservience, but as an obligation of his freedom, and, therefore as a consequence, that where he has liberty of action he has responsibility for action. In a word, the drift of opinion and legislation now is to set labor apart and to withdraw it from its conditions and from the action of economic forces and their consequences, give it immunity from the pitilessness of life. And there are appealing considerations for this drift of opinion and inevitable sympathy with it as with many other conditions, but which the law cannot relieve by a sacrifice of constitutional rights. In what legislation the drift (it is persuasion in some) may culminate cannot now be predicted, but it is very certain that, whatever it be, the judgment now delivered will be cited to justify it. Will it not be said that if one right of an employer can be made to give way, why not another?—made a condition “upon economic or other grounds” of his enterprise. Indeed, may not the question be made more general, and if in supposed benefit to a particular class, and through benefit to them to the public, there may be constraint upon or the imposition of burden upon one right of a citizen, why not upon another? There is, therefore, I

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think, menace in the present judgment to all rights, subjecting them unreservedly to conceptions of public policy. If, however, this general apprehension be not justified, there is threat enough in the judgment of the court to the interest of employers generally as a result of the difference in conditions.

A rather curious argument is used to support the Arizona law. It is said, in justification of its discrimination between employer and employee, that the employer may in relief from it and rescue from its burdens pass them to the consumers of his products, as he does or may do in the case of other expenses of his venture, and in the long-run their incidence is, as it is said it should be, on the public, and that the legislature in so considering was reasoning within constitutional bounds. There is attractive speciousness in the argument. The individual employer seems to be divested of grievance and the problem the law presents to be one of economics and governmental policy; is a kind of taxation, an expense of government, the burden of which is properly laid upon the public and over which a court can have but limited power.

If it is intended by the argument to express no more than a tendency, while it has no relevancy, I think, upon the validity of the law, there may be no danger in it. If it is intended to be erected into a principle, there is danger in it. It is certainly facile and comprehensive. What burden can be put upon industry or the activities of men that may not be justified by it?

Of course, there will be no production unless all of its costs be reimbursed by the price of the articles produced. And by costs I mean as well the burdens of government as profit to the employer—his inducement to enterprise, and the wages of employees—their inducement to labor. Without such reimbursement there will be no production—and cannot be beyond a certain extent and for a certain time; and there is no way to effect it but through the con-



suming public. But recourse to such consumption as a rescue from the law is not a justification for the law, and it is very doubtful if it had any conscious influence in the enactment of the law.

Indeed, in the present case what could have been its influence and to what extent can it have an ameliorating effect? An employer in the indicated industries can have no relief except in the home market. If his products (where there are products) go beyond—go to other States—they will meet the competition of unburdened products. But this is obvious and needs no comment.

THE CHIEF JUSTICE, MR. JUSTICE VAN DEVANTER and MR. JUSTICE McREYNOLDS concur in this dissent.

MR. JUSTICE McREYNOLDS dissenting.

While I earnestly join in the dissent written by Mr. Justice McKenna, it seems not inappropriate to state my own views somewhat more fully. The important and underlying question is common to the five cases. Number 232 is typical and to detail certain facts and circumstances disclosed by the record therein may aid the discussion.

Basing his claim upon the Arizona Employers' Liability Law, Dan Veazey sued plaintiff in error in the United States District Court to recover damages for personal injuries received by him February 10, 1916, while engaged as millwright and carpenter in constructing a "flotation system" at the company's mill or reduction works in Gila County, Arizona "wherein steam, electricity and other mechanical power was then and there used to operate machinery." He alleged that while exercising due care he "suffered severe personal and bodily injuries by an accident arising out of and in course of such labor, service and employment, and due to a condition or conditions of such occupation or employment," which injuries were



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not caused by his negligence but were sustained in the manner following: "Plaintiff in the due course of his said labor, service and employment was standing upon a certain timber or joist incorporated in said 'flotation system' engaged in bolting and fastening together the timbers thereof. That the said timber or joist upon which plaintiff was then and there standing was then and there elevated above the ground or floor of said mill or reduction works a distance of approximately ten feet. That while so engaged as aforesaid, plaintiff slipped from said timber or joist and fell to the ground . . . with great force and violence . . .," was permanently injured and will forever remain sick, sore, lame and crippled.

No charge of negligence or failure to perform any duty was made against the company. It unsuccessfully set up and relied upon invalidity of the Employers' Liability Law because in conflict with the Fourteenth Amendment; judgment went against it; and the cause is here by writ of error to the trial court (Jud. Code, § 237).

Article XVIII of the Arizona Constitution provides:

"Section 4. The common law doctrine of fellow servants, so far as it affects the liability of a master for injuries to his servants resulting from the acts or omissions of any other servant or servants of the common master is forever abrogated.

"Section 5. The defense of contributory negligence or of assumption of risk shall, in all cases whatsoever, be a question of fact and shall, at all times, be left to the jury.

"Section 6. The right of action to recover damages for injuries shall never be abrogated, and the amount recovered shall not be subject to any statutory limitation.

"Section 7. To protect the safety of employees in all hazardous occupations, in mining, smelting, manufacturing, railroad or street railway transportation, or any other industry the Legislature shall enact an Employer's Liability law, by the terms of which any employer,

whether individual, association, or corporation shall be liable for the death or injury, caused by any accident due to a condition or conditions of such occupation, of any employee in the service of such employer in such hazardous occupation, in all cases in which such death or injury of such employee shall not have been caused by the negligence of the employee killed or injured.

"Section 8. The Legislature shall enact a Workmen's Compulsory Compensation law applicable to workmen engaged in manual or mechanical labor in such employments as the Legislature may determine to be especially dangerous, by which compulsory compensation shall be required to be paid to any such workman by his employer, if in the course of such employment personal injury to any such workman from any accident arising out of, and in the course of, such employment is caused in whole, or in part, or is contributed to, by a necessary risk or danger of such employment, or a necessary risk or danger inherent in the nature thereof, or by failure of such employer, or any of his or its officers, agents, or employee, or employees, to exercise due care, or to comply with any [law] affecting such employment; Provided, that it shall be optional with said employee to settle for such compensation, or retain the right to sue said employer as provided by the Constitution."

Obeysing the constitutional mandate, the legislature enacted the "Employers' Liability Law," approved May 24, 1912, (c. 89, Laws of Ariz., 1912, p. 491; Rev. Stats. Ariz., 1913, pars. 3153-3162) which provides:

That to protect the safety of workmen at manual or mechanical labor in many occupations declared hazardous and enumerated in § 4—among them all work in or about mines and in mills, shops, plants and factories where steam or electricity is used to operate machinery—every employer, whether individual, association or corporation "shall be liable for the death or injury, caused by any

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accident due to a condition or conditions of such occupation, of any employee in the service of such employer in such hazardous occupation, in all cases in which such death or injury of such employee shall not have been caused by the negligence of the employee killed or injured."

"Sec. 6. When in the course of work in any of the employments or occupations enumerated in Sec. 4 of this Act, personal injury or death by any accident arising out of and in the course of such labor, service and employment, and due to a condition or conditions of such occupation or employment, is caused to or suffered by any workman engaged therein, in all cases in which such injury or death of such employee shall not have been caused by the negligence of the employee killed or injured, then the employer of such employee shall be liable in damages to [the] employee injured, or, in case death ensues, to the personal representative of the deceased for the benefit of the surviving widow or husband and children of such employee; and, if none, then to such employee's parents; and, if none, then to the next of kin dependent upon such employee, and if none, then to his personal representative, for the benefit of the estate of the deceased." Section 7 requires that questions of contributory negligence and assumption of risk shall be left to the jury. (The full text of the act is in the margin.<sup>1</sup>)

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<sup>1</sup> Laws of Arizona, 1912, Chap. 89, p. 491; Rev. Stats., Ariz. Civil Code, 1913, pars. 3153-3162, p. 1051.

"Sec. 1. That this Act is and shall be declared to be an Employer's Liability law as prescribed in Sec. 7 of Article XVIII of the State Constitution.

"Sec. 2. That to protect the safety of employees in all hazardous occupations in mining, smelting, manufacturing, railroad, or street railway, transportation, or any other industry, as provided in said Sec. 7 of Article XVIII of the State Constitution, any employer, whether individual, association, or corporation, shall be liable for the death or injury, caused by any accident due to a condition or conditions of such occupation, of any employee in the service of such em-

Likewise, the legislature enacted a Compulsory Compensation Law, approved June 8, 1912, applicable to work-

ployer in such hazardous occupation, in all cases in which such death or injury of such employee shall not have been caused by the negligence of the employee killed or injured.

"Sec. 3. The labor and services of workmen at manual and mechanical labor, in the employment of any person, firm, association, company, or corporation, in the occupations enumerated in Sec. 4 of this Act are hereby declared and determined to be service in a hazardous occupation within the meaning of the terms of Sec. 2 of this Act.

"By reason of the nature and conditions of, and the means used and provided for doing the work in, said occupations, such service is especially dangerous and hazardous to the workmen therein, because of risks and hazards which are inherent in such occupations and which are unavoidable by the workmen therein.

"Sec. 4. The occupations hereby declared and determined to be hazardous within the meaning of this Act are as follows:

"1. The operation of steam railroads, electrical railroads, street railroads, by locomotives, engines, trains, motors, or cars of any kind propelled by steam, electricity, cable or other mechanical power, including the construction, use or repair of machinery, plant, tracks, switches, bridges, roadbeds, upon, over, and by which such railway business is operated.

"2. All work when making, using or necessitating dangerous proximity to gunpowder, blasting powder, dynamite, compressed air, or any other explosive.

"3. The erection or demolition of any bridge, building or structure in which there is, or in which the plans and specifications require, iron or steel frame work.

"4. The operation of all elevators, elevating machines or derricks or hoisting apparatus used within or on the outside of any bridge, building or other structure for conveying materials in connection with the erection or demolition of such bridge, building or structure.

"5. All work on ladders or scaffolds of any kind elevated twenty (20) feet or more above the ground or floor beneath in the erection, construction, repair, painting or alteration of any building, bridge, structure or other work in which the same are used.

"6. All work of construction, operation, alteration or repair where wires, cables, switchboards, or other apparatus or machinery are in use charged with electrical current.

"7. All work in the construction, alteration, or repair of pole lines for telegraph, telephone or other purposes.

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men in the same occupations as those declared hazardous by the Employers' Liability Law (c. 14, Laws of Ariz.,

"8. All work in or about quarries, open pits, open cuts, mines, ore reduction works and smelters.

"9. All work in the construction and repair of tunnels, sub-ways and viaducts.

"10. All work in mills, shops, works, yards, plants and factories where steam, electricity, or any other mechanical power is used to operate machinery and appliances in and about such premises.

"Sec. 5. Every employer, whether individual, firm, association, company or corporation, employing workmen in such occupation, of itself or through an agent, shall by rules, regulations, or instructions, inform all employees in such occupations as to the duties and restrictions of their employment, to the end of protecting the safety of employees in such employment.

"Sec. 6. When in the course of work in any of the employments or occupations enumerated in Sec. 4 of this Act, personal injury or death by any accident arising out of and in the course of such labor, service and employment, and due to a condition or conditions of such occupation or employment, is caused to or suffered by any workman engaged therein, in all cases in which such injury or death of such employee shall not have been caused by the negligence of the employee killed or injured, then the employer of such employee shall be liable in damages to employee injured, or, in case death ensues, to the personal representative of the deceased for the benefit of the surviving widow or husband and children of such employee; and, if none, then to such employee's parents; and, if none, then to the next of kin dependent upon such employee, and if none, then to his personal representative for the benefit of the estate of the deceased.

"Sec. 7. In all actions hereafter brought against any such employer under or by virtue of any of the provisions of this Act to recover damages for personal injuries to any employee, or where such injuries have resulted in his death, the question whether the employee may have been guilty of contributory negligence, or has assumed the risk, shall be a question of fact and shall at all times be left to the jury, as provided in Sec. 5 of Article XVIII of the State Constitution.

"Sec. 8. That any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any employer to exempt himself or itself from any liability created by this Act, shall to that extent be void; provided, that in any action brought against any such employer under or by virtue of any of the provisions of this

Spec. Sess. 1912, p. 23). Material portions of it are in the margin.<sup>1</sup>

Act, such employer may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity or that [it] may have paid to the injured employee or his personal representative on account of the injury or death for which said action was brought.

"Sec. 9. In all actions for damages brought under the provisions of this Act, if the plaintiff be successful in obtaining judgment; and if the defendant appeals to a higher court; and if the plaintiff in the lower court be again successful; and the judgment of the lower court is sustained by the higher court or courts; then, and in that event the plaintiff shall have added to the amount of such judgment by such higher court or courts, interest at the rate of 12 per cent. per annum on the amount of such judgment from the date of the filing of the suit in the first instance until the full amount of such judgment is paid.

"Sec. 10. No action shall be maintained under this Act unless commenced within two years from the day the cause of action accrued.

"Sec. 11. All Acts and parts of Acts in conflict herewith are hereby repealed.

"WHEREAS, the State Constitution commands the enactment of an Employers' Liability law by the Legislature at its first session; and

"WHEREAS, this Act being said Employers' Liability law is immediately necessary for the preservation of the public peace, health and safety, an emergency is hereby declared to exist, and this Act shall be in full force, and effect from and after its passage and its approval by the Governor, and is hereby exempt from the operation of the Referendum provision of the State Constitution."

<sup>1</sup> *Workmen's Compulsory Compensation Law.*

Sec. 2. That compensation graduated according to average earnings and limited to \$4,000.00, "shall be paid by his employer to any workman engaged in any employment declared and determined . . . to be especially dangerous, whether said employer be a person, firm, association, company, or corporation, if in the course of the employment of said employee personal injury thereto from any accident arising out of, and in the course of, such employment is caused in whole, or in part, or is contributed to, by a necessary risk or danger of such employment, or a necessary risk or danger inherent in the nature thereof, or by failure of such employer, or any of his or its officers, agents, or employee or employees, to exercise due care, or to comply with any law affecting such employment."

"Sec. 4. In case such employee or his personal representative shall

In *Consolidated Arizona Smelting Co. v. Ujack*, (1914) 15 Arizona, 382, 384, the Supreme Court declared:—"Under the laws of Arizona, an employee who is injured in the course of his employment has open to him three avenues of redress, any one of which he may pursue according to the facts of his case. They are: (1) The common-law liability relieved of the fellow-servant defense and in which the defenses of contributory negligence and assumption of risk are questions to be left to the jury. Const., secs. 4, 5, art. 18. (2) Employers' liability law, which applies to hazardous occupations where the injury or death is not caused by his own negligence. Const., sec. 7, art. 18. (3) The compulsory compensation law, applicable to especially dangerous occupations, by which he may recover compensation without fault upon the part of the employer. Const., sec. 8, art. 18."

In *Inspiration Consolidated Copper Co. v. Mendez*, (July 2, 1917) 19 Arizona, 151, 154, 157, 161, the Supreme Court specifically held that the Employers' Liability Law does not conflict with the Fourteenth Amendment, and, among other things, said:—"That the liability statute must

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refuse to settle for such compensation (as provided in Sec. 8 of Article XVIII of the State Constitution) and chooses to retain the right to sue said employer (as provided in any law provided for in Sec. 7, Article XVIII of the State Constitution) he may so refuse to settle and may retain said right." "Sec. 6. The common law doctrine of no liability without fault is hereby declared and determined to be abrogated in Arizona as far as it shall be sought to be applied to the accidents hereinbefore mentioned." "Sec. 14. . . . Provided, if, after the accident, either the employer or the workman shall refuse to make or accept compensation under this Act or to proceed under or rely upon the provisions hereof for relief, then the other may pursue his remedy or make his defense under other existing statutes, the State Constitution, or the common law, except as herein provided, as his rights may at the time exist. Any suit brought by the workman for a recovery shall be held as an election to pursue such remedy exclusively."



be construed as one creating a liability for accidents resulting in injuries to the workmen engaged in hazardous occupations due to the risks and hazards inherent in such occupations, without regard to the negligence of the employer, as such negligence is understood in the common law of liability; in other words, such statute creates a liability for accident arising from the risks and hazards inherent in the occupation without regard to the negligence or fault of the employer. . . . In other words, this statute creates a liability of the master to damages suffered from any accident befalling his servant while engaged in the performance of duties in dangerous occupations without requiring the negligence of the master to be shown as an element of the right to recover; and it likewise takes away from the master his common-law right of defense of assumption of ordinary risk by the servant, and leaves to the master the right to defend upon the grounds that the servant assumed the ordinary risks other than risks inherent in the occupation." This opinion was reaffirmed in *Superior & Pittsburg Copper Co. v. Tomich*, (July 2, 1917) 19 Arizona, 182.

In *Arizona Copper Co. v. Burciaga*, (1918) 177 Pac. Rep. 29, 31, 32, 33, the Supreme Court said:—"As clearly intimated by this court in *Inspiration Consolidated Copper Co. v. Mendez*, 19 Arizona, 151; 166 Pac. 278, 1183, the Employers' Liability Law is designed to give a right of action to the employee injured by accident occurring from risks and hazards inherent in the occupation and without regard to the negligence on the part of the employer. Such is the clear import of the said Employers' Liability Law. . . .

"The liability incurred by the employer from a personal injury sustained by his employee from an accident arising out of and in the course of labor, service, and employment in hazardous occupations specified in the statute, and due to a condition or conditions of such occupation



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or employment, if such shall not have been caused from the negligence of such employee, is such an amount as will compensate such employee for the injuries sustained by him directly attributable to such accident. . . . 'Liable in damages,' as used in paragraph 3158, c. 6, of title 14, Employers' Liability Law, Rev. Stat. of Ariz. 1913, has reference to and means that the employer becomes obligated to pay to the employee injured in an accident while engaged in an occupation declared hazardous, occurring without fault of the employer, all loss to the employee which is actually caused by the accident and the amount of which is susceptible of ascertainment. . . . Of course, mental and physical suffering experienced by the employee injured, proximately resulting from the accident, the reasonable value of working time lost by the employee, necessary expenditures for the treatment of injuries and compensation for the employee's diminished earning power directly resulting from the injury, and perhaps other results causing direct loss, are matters of actual loss and as such recoverable."

From the foregoing it appears that we have for consideration a statute which undertakes, in the absence of fault, to impose upon all employers (individual and corporate) engaged in enterprises essential to the public welfare, not subject to prohibition by the State and often not attended by any extraordinary hazard, an unlimited liability to employees for damages resulting from accidental injuries—including physical and mental pain—which may be recovered by the injured party or his administrator for benefit of widow, children, parents, next of dependent kin or the estate. The individual who hires only one man and works by his side is put on the same footing as a corporation which employs thousands; no attention is given to probable ability to pay the award; length of service is unimportant—a minute seems enough; wages contracted for bear no necessary relationship to what may be re-

covered; and a single accident which he was powerless to prevent or provide against may pauperize the employer. And by reason of existing constitutional and statutory provisions an injured workman may claim under this act or under the Compensation Law or according to the common law materially modified in his favor by exclusion of the fellow-servant rule and otherwise. On the other hand, while the employer is declared subject to new, uncertain and greatly enlarged liability, notwithstanding the utmost care, nothing has been granted him in return.

In such circumstances, would enforcement of the challenged statute deprive employers of rights protected by the Fourteenth Amendment? Plainly, I think, nothing short of an affirmative answer is compatible with well-defined constitutional guarantees.

Of course the Fourteenth Amendment was never intended to render immutable any particular rule of law nor did it by fixation immortalize prevailing doctrines concerning legal rights and liabilities. Orderly and rational progress was not forestalled. *Holden v. Hardy*, 169 U. S. 366, 387. But it did strip the States of all power to deprive any person of life, liberty or property by arbitrary or oppressive action—such action is never due process of law.

In the last analysis it is for us to determine what is arbitrary or oppressive upon consideration of the natural and inherent principles of practical justice which lie at the base of our traditional jurisprudence and inspire our Constitution. A legislative declaration of reasonableness is not conclusive; no more so is popular approval—otherwise constitutional inhibitions would be futile. And plainly, I think, the individual's fundamental rights are not proper subjects for experimentation; they ought not to be sacrificed to questionable theorization.

Until now I had supposed that a man's liberty and property—with their essential incidents—were under the

protection of our charter and not subordinate to whims or caprices or fanciful ideas of those who happen for the day to constitute the legislative majority. The contrary doctrine is revolutionary and leads straight towards destruction of our well-tried and successful system of government. Perhaps another system may be better—I do not happen to think so—but it is the duty of the courts to uphold the old one unless and until superseded through orderly methods.

After great consideration in *Adair v. United States*, 208 U. S. 161, and *Coppage v. Kansas*, 236 U. S. 1, this court declared that the Fourteenth Amendment guarantees to both employer and employee the liberty of entering into contracts for service subject only to reasonable restrictions. "The principle is fundamental and vital."

In the first case an act of Congress prohibiting interstate carriers from requiring one seeking employment, as a condition of such employment, to enter into an agreement not to become or remain a member of a labor organization was declared in conflict with the Fifth Amendment. In *Coppage v. Kansas* a state statute which declared it unlawful to require one to agree not to be a member of a labor association as a condition of securing employment was held invalid under the Fourteenth Amendment and we said: "An interference with this liberty so serious as that now under consideration, and so disturbing of equality of right, must be deemed to be arbitrary, unless it be supportable as a reasonable exercise of the police power of the State." In *Truax v. Raich*, 239 U. S. 33, 41, an Arizona statute prohibiting employment of aliens except under certain conditions was struck down. We there said: "It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure."

The right to employ and the right to labor are correl-

ative—neither can be destroyed nor unduly hindered without impairing the other. The restrictions imposed by the act of Congress, struck down in the *Adair Case*, by the Kansas statute, declared invalid in the *Coppage Case*, and by the Arizona statute, held inoperative in the *Truax Case*, viewed as practical matters seem rather trivial in comparison with the burden laid on employers by the statute before us. And the grounds suggested to support it really amount in substance to asserting that the legislature has power to protect society against the consequences of accidental injuries and, therefore, it may impose the loss resulting therefrom upon those wholly without fault who have afforded others welcomed opportunities to earn an honest living under unobjectionable conditions. As a measure to stifle enterprise, produce discontent, strife, idleness and pauperism the outlook for the enactment seems much too good.

In *New York Central R. R. Co. v. White*, and *Mountain Timber Co. v. Washington*, 243 U. S. 188, 219, as I had supposed for reasons definitely pointed out, we held the challenged statutes not in conflict with the Fourteenth Amendment although they imposed liability without fault and introduced a plan for compensating workmen, unknown to the common law. The elements of those statutes regarded as adequate to save their validity we specified; if such characteristics had not been found, the result, necessarily, would have been otherwise unless we were merely indulging in harmful chatter.

Here, without fault, the statute in question imposes liability in some aspects more onerous than either the New York or Washington law prescribed; and the grounds upon which we sustained those statutes are *wholly* lacking. The employer is not exempted from any liability formerly imposed; he is given no *quid pro quo* for his new burdens; the common-law rules have been set aside without a reasonably just substitute; the employee is relieved from

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consequences of ordinary risks of the occupation and these are imposed upon the employer without defined limit to possible recovery which may ultimately go to non-dependents, distant relatives, or, by escheat, to the State; "the act bears no fair indication of a just settlement of a difficult problem affecting one of the most important of social relations"—on the contrary it will probably intensify the difficulties.

The liability is not restricted to the pecuniary loss of a disabled employee or those entitled to look to him for support, but includes compensation for physical and mental pain and suffering; a recovery resulting in bankruptcy to an employer may benefit only a distant relative, financially independent; the prescribed responsibility is not "to contribute reasonable amounts according to a reasonable and definite scale by way of compensation for the loss of earning power arising from accidental injuries," but is unlimited, unavoidable by any care, incapable of fairly definite estimation in advance and enforceable by litigation probably acrimonious, long drawn out and expensive. While the statute is inattentive to the employer's fault it permits recovery in excess of the employee's pecuniary misfortune; and provides for compensation, not general, but sporadic, uncertain, conjectural, delayed, indefinite as to amount and not distributed over such long period as to afford actual protection against loss or lessened earning capacity with insurance to society against pauperism, etc.

I am unable to see any rational basis for saying that the act is a proper exercise of the State's police power. It is unreasonable and oppressive upon both employer and employee; to permit its enforcement will impair fundamental rights solemnly guaranteed by our Constitution and heretofore, as I think, respected and enforced.

THE CHIEF JUSTICE, MR. JUSTICE McKENNA and MR. JUSTICE VAN DEVANTER concur in this opinion.